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Supreme Court of the United States

OCTOBER TERM, 1972

No.

72 - 1035

JULIA ROGERS,

Petitioner,

v.

LEROY LOETHER and MARIANE LOETHER, his wife,
and MRS. ANTHONY PEREZ

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

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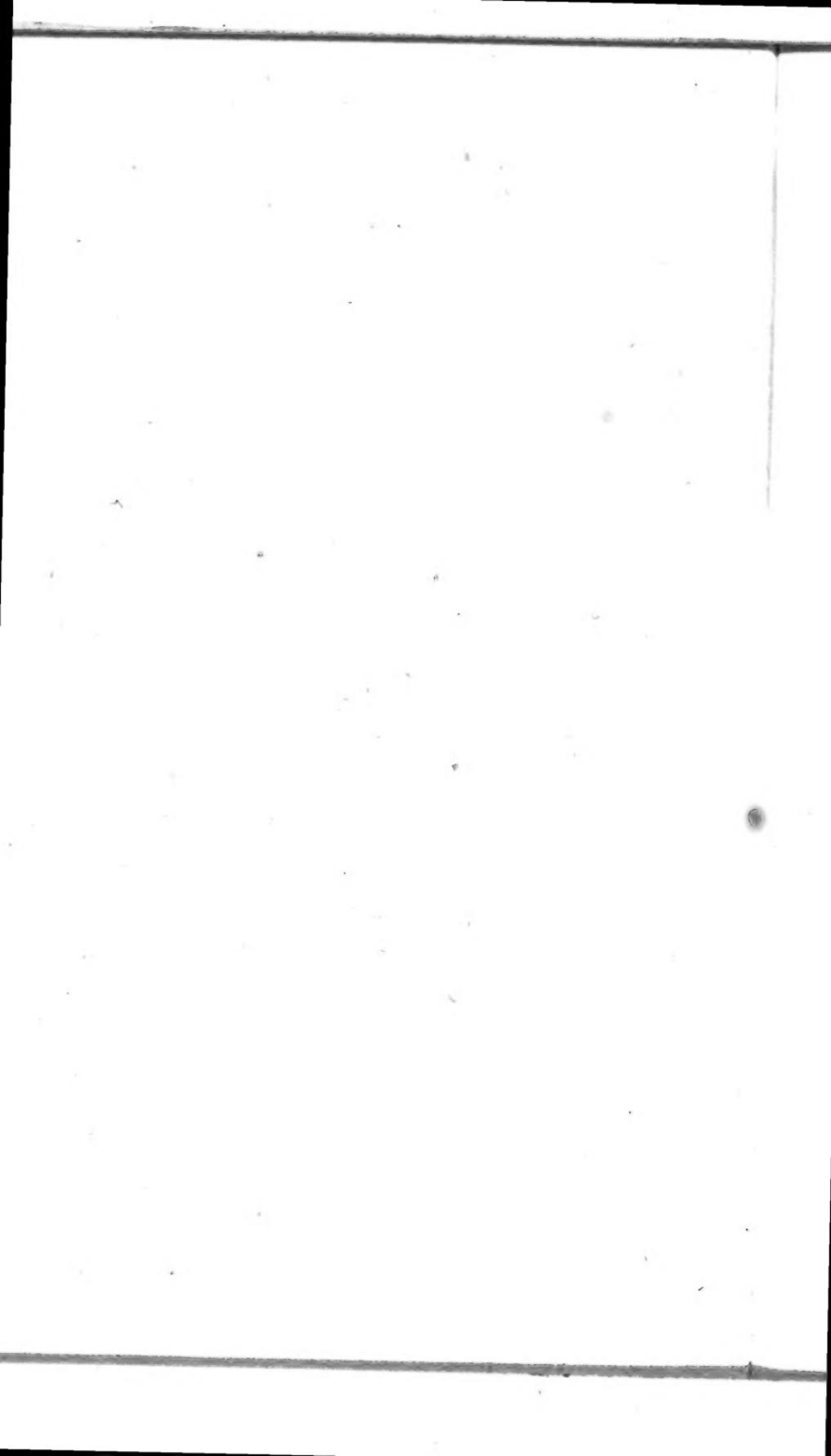
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**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on September 29, 1972.

Citations to Opinions Below

1. Opinion of district court denying demand for jury trial, May 19, 1970, reported 312 F.Supp. 1008 (1a-6a).
2. District court's unreported findings of fact and conclusions of law, October 27, 1970 (7a-11a).
3. Opinion of Court of Appeals, reported 467 F.2d 1110 (13a-33a).

Jurisdiction

The court of appeals entered judgment on September 29, 1972 (34a). On December 14, 1972, Mr. Justice Rehnquist extended the time for filing this petition to January 27, 1973. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether either Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-19, or the Seventh Amendment to the United States Constitution, require a trial by jury on the demand of a landlord in an action by a black apartment applicant for injunctive relief and punitive damages to redress a racially discriminatory refusal to rent?

Constitutional and Statutory Provisions Involved

1. United States Constitution, Amendment VII provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to rules of the common law.

2. Section 804(a) of the Civil Rights Act of 1968, 42 U.S.C. § 3604(a) provides:

As made applicable by section 803 and except as exempted by sections 803(b) and 807, it shall be unlawful—

- (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale

or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.

3. Section 812 of the Civil Rights Act of 1968, 42 U.S.C. § 3612, provides:

(a) The rights granted by sections 803, 804, 805, and 806 may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: *Provided, however,* That the court shall continue such civil case brought pursuant to this section or section 810(d) from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the Secretary or to the local or State agency and which practice forms the basis for the action in court: *And provided, however,* That any sale, encumbrance, or rental consummated prior to the issuance of any court order issued under the authority of this Act, and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence of the filing of a complaint or civil action under the provisions of this Act shall not be affected.

(b) Upon application by the plaintiff and in such circumstances as the court may deem just, a court of the United States in which a civil action under this section has been brought may appoint an attorney for the plaintiff and may authorize the commencement of

a civil action upon proper showing without the payment of fees, costs, or security. A court of a State or subdivision thereof may do likewise to the extent not inconsistent with the law or procedures of the State or subdivision.

- (c) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than \$1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

Statement of the Case

On November 7, 1969, petitioner Julia Rogers complained in United States District Court for the Eastern District of Wisconsin that Leroy and Mary Loether, white owners of a house in Milwaukee,¹ violated Section 804 of the Civil Rights Act of 1968 by refusing to rent an apartment to Mrs. Rogers because she is black. She requested injunctive relief and \$1000 punitive damages, but neither alleged nor sought actual damages. Jurisdiction of the district court was based on Section 812 of the Act. After an evidentiary hearing on November 20, 1969, the court preliminarily enjoined rental of the apartment pending final determination of the action. Defendants answered and demanded a jury trial of issues of fact.

¹ The complaint also named Mary Loether's cousin, Mrs. Anthony Perez, who resided in the house and was authorized to show the vacant apartment to applicants.

By the time the district court considered and denied the jury demand, two developments intervened. Following the preliminary hearing petitioner found a place to live and disclaimed need for injunctive relief. Also, during pre-trial proceedings petitioner indicated an interest in compensatory as well as punitive damages, and the court viewed her claim as including both. The court ruled that Section 812 of the Civil Rights Act of 1968 did not expressly require jury trials and appeared "to treat the actual damages issue as one for the trial judge rather than a jury" (4a). It drew support for this construction from rulings that similar language in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), does not require jury determination of back pay awards in employment discrimination cases. On the constitutional issue, the district court held "this cause of action is a statutory one invoking the equity powers of the court, by which the court may award compensatory and punitive money damages as an integral part of the final decree so that complete relief may be had. The action is not one in the nature of a suit at common law, and therefore there is no right to trial by jury on the issue of money damages in the case" (2a).

The court entered a standard pre-trial order requiring petitioner to file "an itemized statement of special damages," and, on July 6, 1970, a second order requiring petitioner to "set forth the actual damages claimed and the evidentiary facts in support of such damages." Petitioner filed no statement itemizing actual damages, and at the October 1970 trial the court sustained defendants' objections to testimony concerning actual damages.² As the court framed the damage issue at trial, "it's really narrowed down to punitive damages."³ At the conclusion of

² Trial transcript, October 26, 1970, pp. 17-18.

³ *Id.* at 5, 7.

the trial,⁴ the court found that the Loethers effectively rented the apartment to Mrs. Rogers through intermediaries, but, in violation of the Civil Rights Act of 1968, revoked the rental upon learning that Mrs. Rogers is black (7a-11a). The court granted \$250 punitive damages, but denied actual damages, attorney's fees and costs (12a).

The Seventh Circuit reversed, holding that defendants' jury trial demand should have been granted.⁵ Although the court posed the question—"whether appellant was entitled to a jury trial in an action for compensatory and punitive damages brought under § 812 of the Civil Rights Act of 1968" (13a)—it did not predicate its decision on the abandonment of petitioner's request for injunctive relief and held that the right to a jury trial may be tested by the relief requested in petitioner's complaint (25a). Nevertheless, the court ignored the fact that the complaint⁶ alleged no actual damages. Neither did it consider that the district court confined the damage issue at trial to, and rendered judgment for, punitive damages only. In short, the court of appeals decided the broadest jury question possible under Title VIII of the Civil Rights Act of 1968.

The court's opinion centers on its conclusion that an action to enforce Title VIII of the Civil Rights Act of 1968 is "in the nature of a suit at common law" (21a). Three reasons are offered. First, the decision-making tribunal is a court. In this way the court distinguished *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-

⁴ Trial proceedings were expedited by incorporating evidence at the preliminary hearing into the trial record.

⁵ The court of appeals rejected defendants' other contentions. The court ruled that the district court's finding of discrimination was not clearly erroneous (14a). It also concluded that the Act authorizes an award of punitive damages even in the absence of actual damages (15a).

49, limiting its principle to administrative agencies. Second, money damages are sought. The court read *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, to mandate "that once *any* claim for money damages is made, the legal issue—whether defendant breached a duty owed plaintiff for which defendant is liable in damages—must be tried to a jury whether or not there exists an equitable claim to which the damage claim might once have been considered 'incidental'" (27a-28a, emphasis added). Third, the court concluded that "the nature of the substantive right asserted, although not specifically recognized at common law, is analogous to common law rights" (22a). The court drew its principal analogy to the obligation of English innkeepers to rent available lodgings to travelers.

The court's extended constitutional analysis culminates in statutory interpretation. It finds the district court's statutory analysis "persuasive but not compelling" and concludes that the statute "implies, without expressly stating, that a jury's participation is appropriate" when damages are sought (31a). In the end the court views as "controlling" a canon of construction requiring the interpretation of statutes to avoid "grave doubts" of unconstitutionality and concludes that Title VIII of the Civil Rights Act of 1968 itself requires jury trials when damages are claimed (33a).

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted to Determine an Issue Fundamental to the Successful Administration of an Important Act of Congress.

Section 801 of the Civil Rights Act of 1968 declares it is national policy to provide "fair housing throughout the United States." 42 U.S.C. § 3601. The statute assigns certain administrative responsibilities to the Secretary of Housing and Urban Development and limited powers to the Attorney General of the United States. Against "the enormity of the task of assuring fair housing . . . the main generating force must be private suits in which . . . the complainants act not only on their own behalf but also 'as private attorney general in vindicating a policy that Congress considered to be of the highest priority.'" *Trafficante v. Metropolitan Life Insurance Company*, 41 U.S.L.W. 4071, 4073 (U.S. Dec. 7, 1972). Unfortunately, the decision of the court of appeals diminishes the effectiveness of private enforcement actions and jeopardizes the ability of the Act to contribute much beyond the enunciation of national policy.

Critical decisions made in the early life of a statute may forever affect its usefulness. In the case of Title VIII the mode of trial may be the most important such decision. The mode selected, either as a result of statutory or constitutional interpretation, will determine the cost, efficiency, and credibility of the mechanism entrusted to enforce the important rights declared by Congress. These considerations may not bear on this Court's ultimate judgment on the requirements of the Seventh Amendment, but should

weigh heavily in favor of giving plenary consideration to the statutory and constitutional issues in this case.

Jury trials will add cost and delay to the administration of the statute. The median interval in federal courts from complaint to trial is 10 months in non-jury cases but 14 months in jury cases.* To a person needing a home, that additional delay in achieving a basic right may be intolerable. Jury trials are also longer and more costly than court trials. Although the statute authorizes the award of reasonable attorney's fees, many of the volunteer lawyers on whom plaintiffs still depend may be discouraged by the increased complexity and cost of extended jury trials.[†]

We are also concerned with prejudice. Admittedly, if the statute or Constitution require jury trials, the possibility of jury prejudice would be an unavoidable concomitant. Still, this consideration supports certiorari. The bitter legislative struggle to adopt a national fair housing law reflects divisions in our society not instantaneously resolved by the Act's passage. We might wish that jurors would be persuaded to lay aside any question of the correctness of the law they enforce, but it frankly seems illusory to think that unanimity of judgment can be achieved with enough frequency to make a reality of the law. To the extent that means exist to screen prejudice in the voir dire of jurors, the process will be costly to plaintiffs and burdensome to the courts. Furthermore, even the possibility of jury

* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1972 ANNUAL REPORT OF THE DIRECTOR II-74.

[†] Jury trials are also costly to the United States, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1972 JUROR UTILIZATION IN UNITED STATES COURTS A1-10, and a factor in the ability of federal courts to dispose cases expeditiously. While these considerations do not affect the interpretation of the Seventh Amendment, the impact of jury trials on court dockets and budgets might properly be considered in determining whether to grant certiorari.

prejudice will seriously affect the Act's credibility to racial minorities. Attempting to buy a house when it means buying a lawsuit as well is difficult enough, but when the judges of fact are drawn from the excluding community the effort will seem impossible to many. Unless minorities believe the law will be fairly administered, it will be a dead letter.

Finally, judicial efficiency warrants review at this time of the jury issue in Title VIII actions. While this is the first appellate decision on the right to juries in actions for damages under Section 812,⁸ district courts are facing the issue with increasing frequency.⁹ Those that decide incorrectly may be required to re-try cases. Those that follow the opinion below will soon confront myriad questions concerning the allocation of functions between judge and jury. We submit this Court should render early judgment on the threshold question whether juries are required to guide lower federal courts in their administration of this new and important law.

⁸ One appellate court has denied the right to a jury trial in an action by the United States for injunctive relief only pursuant to Section 813 of the Act, 42 U.S.C. § 3613. *United States v. Reddoch*, No. 72-1326 (5th Cir., Oct. 4, 1972).

⁹ *E.g., Cauley v. Smith*, 347 F.Supp. 114 (E.D. Va. 1972) (jury trial denied); *Marr v. Rife*, Civ. No. 70-218 (S.D. Ohio, Aug. 31, 1972) (jury trial denied); *Kastner v. Brackett*, 326 F.Supp. 1151 (D. Nev. 1971) (jury trial granted).

II.

The Statute Provides That Issues of Fact in Actions for Injunctive Relief and Damages Be Tried by Judges Without Juries.

Only a strained reading of Section 812 of the Civil Rights Act of 1968 would support a conclusion that in an unspecified way Congress fragmented between judge and jury the remedial powers necessary to enforce the fair housing law. Every indication is that Congress assigned to judges alone the task of determining liability and integrating the array of possible remedies—injunctions, actual damages, punitive damages, and attorney's fees—into effective unified judgments which achieve the objectives of the law.

The "court" which enforces the statute is described in terms defining judges not juries. Section 812(a) mandates continuances "if the court believes" that conciliation will be successful. Section 812(b) provides the court may appoint attorneys and authorize actions without fees, costs, or security "in such circumstances as the court may deem just." Finally, Section 812(c) provides:

The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than \$1000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, that the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

The judicial processes involved in "if the court believes," "as the court may deem just," "the court may grant relief,

as it deems appropriate," and "in the opinion of the court" all convey determinations of judges, not juries.¹⁰

Debates in Congress immediately preceding the Act's adoption are not helpful, but the early history of the Act sheds some light. The origin of Section 812(c) is President Johnson's proposed Civil Rights Act of 1966.¹¹ Section 406 of the administration bill provided that in actions to enforce the proposed fair housing title:

(c) The court may grant such relief as it deems appropriate, including a permanent or temporary injunction, restraining order, or other order, and may award damages to the plaintiff, including damages for humiliation and mental pain and suffering, and up to \$500 punitive damages.

(d) The court shall allow a prevailing plaintiff a reasonable attorney's fee as part of the costs.¹²

Attorney General Katzenbach testified about the right to a jury trial under the administration proposal:

¹⁰ Lower federal courts consistently rule that similar language in Title VII of the Civil Rights Act of 1964 does not require trial by jury. That act provides "if the court finds" racial discrimination in employment "the court" may order injunctive relief and back pay. 42 U.S.C. § 2000e-5(g) (1970). Legislative history confirms that juries are not required, 110 Cong. Rec. 7255 (1964), and without exception courts deny employer demands for juries. *E.g.*, *Johnson v. Georgia Highway Express*, 417 F.2d 1122, 1125 (5th Cir. 1969); *Lowry v. Whitaker Cable Corporation*, 348 F.Supp. 202, 209 fn. 3 (W.D. Mo. 1972); *Williams v. Travenol Laboratories*, 344 F.Supp. 163 (N.D. Miss. 1972); *Cheatwood v. South Central Bell Telephone and Telegraph Co.*, 303 F.Supp. 754 (M.D. Ala. 1969); *Culpepper v. Reynolds Metals Co.*, 296 F.Supp. 1232 (N.D. Ga. 1968), *rev'd on other grounds*, 421 F.2d 888 (5th Cir. 1970). There is no reason to believe that Congress in assigning civil rights enforcement responsibilities to the courts varied the definition of "the court" from one major enactment to another.

¹¹ 112 Cong. Rec. 9390 (1966).

¹² S. 3296, § 406, 112 Cong. Rec. 9397 (1966).

Senator Ervin. Now, I would like to know under the same subsection (c) of section 408 (sic) who determines the amount of damages that are to be awarded if a case is made out under Title IV of the bill.

Attorney General Katzenbach. The court does.

Senator Ervin. That is the judge.

Attorney General Katzenbach. Yes, sir.

Senator Ervin. There is no jury trial.

Attorney General Katzenbach. No, sir.¹³

The Attorney General, on several other occasions, indicated that juries were not intended by explaining that the bill authorized punitive damages "in the court's discretion."¹⁴

Between the administration's first proposal in 1966 and the enactment of Title VIII in 1968, the Act underwent many changes, primarily in the formulation and abandonment of proposals for administrative enforcement. In the end, Congress elected judicial enforcement in a form essentially similar to the administration's 1966 proposal. Con-

¹³ Hearings on S. 3296 before the Subcomm. on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 2nd Sess., pt. 2, at 1178 (1966). In the continuation of this exchange Attorney General Katzenbach modified this answer in cases in which no injunctive relief but *only* damages are sought:

Senator Ervin. Well, is the administration opposed to or has it forsaken the ancient American love for trial by jury?

Attorney General Katzenbach. No, sir, I assume if there was a suit here that was *purely* for damages that the court would use a jury. *Ibid.*, emphasis added.

Petitioner's action cannot be described as an action "purely for damages." It was brought as an action for injunctive relief and damages, and the Court of Appeals acknowledged that the right to a jury is tested by the relief requested in the complaint (25a).

¹⁴ *Id.*, pt. 1, at 84; Hearings on H.R. 14765 Before Subcommittee No. 5 of the House Comm. on the Judiciary, 89th Cong., 2nd Sess., ser. 16, at 1057, 1070 (1966); 112 Cong. Rec. 9399 (1966).

gress deleted specific authority to recover damages for humiliation, mental pain, and suffering, increased the authorized award of punitive damages, and modified the attorney's fees requirement; but, apart from these changes, the present enforcement provision is the one Attorney General Katzenbach described to Congress in 1966. It should be interpreted now as it was interpreted to Congress by its principal spokesman, and consistent with its text not be read to require juries in actions for injunctive relief and damages.

Court trials serve important statutory objectives. Section 814 requires that enforcement actions "be in every way expedited." In fair housing cases, most facts relevant to final judgment are presented at preliminary injunction hearings only days after the filing of complaints. Then, final determinations are expedited by incorporating this evidence into trial records, as was done in this case. If juries are mandated, parties will be required to re-try facts already tried before judges at preliminary injunction hearings. A statutory construction requiring re-trials hardly comports with a command that actions "be in every way expedited." Also, court rather than jury trials serve the Congressional objective of minimizing the cost of litigation. Congress authorized the appointment of attorneys, the commencement of actions without fees, costs, or security, and the award of attorney's fees to prevailing plaintiffs. The increased costs resulting from re-trial of facts would seriously undermine the effort to create an inexpensive judicial remedy. "Due consideration of the structure and purpose of the . . . Act as a whole, as well as the particular provisions of the Act brought in question,"¹⁸ confirms that Congress intended issues of fact in Title VIII actions to be determined by judges not juries.

¹⁸ *Katchen v. Landy*, 382 U.S. 323, 328.

III.

The Seventh Amendment Does Not Prevent Congress From Enforcing the Fair Housing Law in Federal Courts Without the Intervention of Juries.

The court of appeals relied on a canon that statutes should be construed to avoid "grave doubts" of constitutionality (33a). While this may be proper in clashes between constitutional values and ordinary statutes, this case poses a different problem. Title VIII enforces the Thirteenth and Fourteenth Amendments to the United States Constitution,¹⁶ and the "cherished aims"¹⁷ which underlie these amendments. This Court should not allow the constitutional values expressed in Title VIII to be frustrated by canons of construction. The judgment of Congress that it is appropriate to enforce the Civil War amendments in court rather than jury trials should be set aside only on the squarest holding that the Seventh Amendment requires otherwise. Nothing in that amendment or the decisions of this Court requires any such conclusion.

a. Actions to Enforce Title VIII Are Not in the Nature of Suits at Common Law.

The Seventh Amendment preserves the right to trial by jury "in suits at common law" to the extent the right was known when the Amendment was adopted.¹⁸ In time, the

¹⁶ Following *Jones v. Mayer*, 392 U.S. 409, federal courts have held that Title VIII is an appropriate exercise of Congressional power under the Thirteenth Amendment. *United States v. Hunter*, 459 F.2d 205, 214 (4th Cir. 1972); *United States v. Real Estate Development Corporation*, 347 F.Supp. 776, 781 (N.D. Miss. 1972); *United States v. Mintzes*, 304 F.Supp. 1305, 1312 (D. Md. 1969); *Brown v. State Realty*, 304 F.Supp. 1236, 1240 (N.D. Ga. 1969).

¹⁷ *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 98 (Frankfurter, J., concurring).

¹⁸ *Baltimore & C. Line v. Redman*, 295 U.S. 654, 657.

question has evolved to be whether a controversy is "in the nature of a suit at common law."¹⁰ Thus, while the Amendment's application to rights created by statute rather than judicial decision is not precluded,²⁰ the question remains whether particular statutory rights bear sufficient relation to rights known to the common law in 1791 to fall within the Amendment's limited scope.

The rights created by Title VIII of the Civil Rights Act of 1968 are not remotely related to anything known to the common law in 1791. Although by that time English common law no longer enforced the state of slavery,²¹ a slave who continued to work for a master was not entitled to wages.²² The limited common law rights of blacks in

¹⁰ *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48.

²⁰ While the Seventh Amendment may apply to some federal statutes, the Seventh Circuit was incorrect in stating that the "principal significance" of the amendment has been in the trial of federal questions (16a-17a). To the contrary, the primary reach of the amendment has always been diversity actions in which ordinary common law disputes are litigated. Indeed, both Massachusetts and New Hampshire in their call for a federal bill of rights focused on civil juries in diversity suits, and proposed that:

"VIII. In civil actions between citizens of different states, every issue of fact, arising in actions at common law, shall be tried by a jury"

I. J. ELIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 323, 326 (2d ed.) (emphasis added). The framers of the Seventh Amendment also framed the First Judiciary Act, which conferred no general federal question jurisdiction on federal courts. Thus, with only limited exceptions, civil juries in federal courts were confined for an extended period to common law diversity actions. Even today, the number of jury trials in diversity actions far exceeds the number in federal question actions. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1972 ANNUAL REPORT OF DIRECTOR A-23.

²¹ *Somerset v. Stewart*, 98 Eng. Rep. 499 (K.B. 1772).

²² *King v. Inhabitants of Thames Ditton*, 99 Eng. Rep. 891 (1785); A. LESTER & G. BINDMAN, RACE AND LAW 32 (1972).

England did not extend outside England; slavery was not abolished in English colonies until 1834. More generally, "English judges have never declared that acts of racial discrimination committed [in England] are against public policy."²³ In this country, the Constitution acknowledged slavery²⁴ and this Court interpreted it to deny citizenship to freed blacks.²⁵ It required a civil war before "slavery, as a legalized social relation, perished,"²⁶ and the Constitution amended to authorize Congress "to pass all laws necessary and proper for abolishing all badges and incidents of slavery. . . ."²⁷ No analogy to the duties of English innkeepers²⁸ overcomes the fact that Title VIII's origins are not English common law but rather a major constitutional revolution long after the adoption of the Seventh Amendment.²⁹

The Seventh Circuit also attributed a common law character to this action because the original tribunal in Title VIII actions is a court, not an administrative agency. It reads this Court's decision in *N.L.R.B. v. Jones & Laughlin*, 301 U.S. 1, to require Congress to choose between administrative agencies or juries, without the intermediate pos-

²³ A. LESTER & G. BINDMAN, *supra* note 22, at 25.

²⁴ Art. I, § 2, art. IV, § 2.

²⁵ *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393.

²⁶ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 68.

²⁷ *Civil Rights Cases*, 109 U.S. 3, 20.

²⁸ Even among public accommodations the innkeeper's duties had limited scope, and did not include lodging houses, boarding houses, private residential hotels, places of entertainment, and restaurants. A. LESTER & G. BINDMAN, *supra* note 22, at 65.

²⁹ Compare *Culpepper v. Reynolds Metals Company*, 296 F.Supp. at 1241: "The focus of [Title VII] is upon the elimination of discrimination in employment, the freedom from which there was no guarantee at common law."

sibility of court trials. We doubt this Court intended to limit Congressional options in enforcing modern statutes. It is not the forum, but the nature of the claim which determines the constitutional issue. If the Constitution allows the claim to be adjudicated without a jury, then Congress should be permitted latitude in determining how the law should be enforced.

b. A Court in a Title VIII Action Acts as a Court of Equity With Power to Afford Complete Relief.

The common element in all fair housing proposals considered by Congress was that any law should be enforced—whether by courts, the Secretary of Housing and Urban Development, or a Fair Housing Board—by orders compelling cessation of racially discriminatory housing practices.²⁰ Title VIII supplements this with the power to award damages, but the Act's basic authority is the power to order the actual provision of housing on a non-discriminatory basis. Thus, a court enforcing Title VIII may fairly be characterized in historical terms as a court of equity. As such, it has power "to decree complete relief and for that purpose may accord what would otherwise be legal remedies."²¹

The power of the English chancellor to both issue an injunction and decree an account for waste was well established when the Seventh Amendment was adopted.²² In this country, the acknowledged power of a court of equity

²⁰ Compare S.3296, the administration's 1966 bill, 112 Cong. Rec. 9396 (1966) and H.R. 14765, as modified and passed by the House, 112 Cong. Rec. 18739 (1966), with Senator Mondale's amendment, 114 Cong. Rec. 2270 (1968), and Senator Dirksen's substitute, 114 Cong. Rec. 4570-73 (1968).

²¹ *Katchen v. Landy*, 382 U.S. at 338.

²² *Jesus College v. Bloom*, 26 Eng. Rep. 953 (Ch. 1745).

in a suit for specific performance to award damages enabled Chief Justice Marshall to observe, "it is . . . well settled that if the jurisdiction attaches, the court [of equity] will go on to do complete justice, although in its progress it may decree on a matter which was cognizable at law."³³ This Court repeatedly sustained the power of equity courts in patent and copyright cases to retain jurisdiction "for the sake of administering an entire remedy and complete justice,"³⁴ and relied on these cases to hold that "[the Seventh Amendment] has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law."³⁵

The court of appeals reads *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, and *Ross v. Bernhard*, 396 U.S. 531, to negate the historic power of courts of equity. It concludes these cases require jury trials "once any claim for money damages is made" (27a). There are several reasons why the court is wrong.

First, subsequent to *Beacon Theatres* and *Dairy Queen*, this Court has reaffirmed the vitality of equity's power to decree complete relief.³⁶

Second, the court confuses claims and remedies. In an ordinary Title VIII action there is only a single claim: an unlawful act of racial discrimination has been committed. Only if the claim is established does a court consider the

³³ *Cathcart v. Robinson*, 30 U.S. (5 Pet.) 264, 276.

³⁴ *Root v. Railway Co.*, 105 U.S. 189, 214; *Clark v. Wooster*, 119 U.S. 322, 325.

³⁵ *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. at 48, citing *Clark v. Wooster*, *supra*.

³⁶ *Katchen v. Landy*, 382 U.S. at 338.

remedies which may be used "as it deems appropriate." Section 812(c). The court's exercise of discretion is undoubtedly governed by the purpose of the statute,³⁷ but within it the court has the power to select or group the remedies made available by Congress.³⁸ Therefore, in no sense do "damages" constitute a separate claim. The "basic character"³⁹ of a Title VIII action is not determined by the fact that one among several remedies made available by the statute is money damages.

Third, *Beacon Theatres*, *Dairy Queen*, and *Ross* differ markedly from actions to enforce Title VIII. The dispute in *Beacon Theatres* arose under the antitrust laws, which this Court construes to create a statutory right to trial by jury.⁴⁰ The basic controversy in *Dairy Queen* involved an alleged breach of contract.⁴¹ The corporation's claim in *Ross* included ordinary breach of contract and negligence.⁴² In contrast, under Title VIII there is "a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury."⁴³

Finally, "the rule of *Beacon Theatres* and *Dairy Queen* . . . is itself an equitable doctrine . . ."⁴⁴ Equity often decreed complete relief to avoid multiple actions. Yet, jury trials under Title VIII would require re-trial of facts heard

³⁷ Cf. *Mitchell v. De Mario Jewelry*, 361 U.S. 288, 296.

³⁸ One example of the interrelationship of possible remedies is *Jones v. Mayer* where this Court thought injunctive relief could be fashioned which would obviate any actual damage problem. 392 U.S. at 414 fn. 14.

³⁹ *Simler v. Conner*, 372 U.S. 221, 223.

⁴⁰ 359 U.S. at 504.

⁴¹ 369 U.S. at 477.

⁴² 396 U.S. at 542.

⁴³ *Katchen v. Landy*, 382 U.S. at 339.

⁴⁴ *Ibid.*

expeditiously by district courts at preliminary injunction hearings, a wasteful result which equity does not require.

c. **There Is No Right to a Jury Trial in Respect to the Limited Punitive Damages Remedy Available Under the Statute.**

The court of appeals discussed actual damages hypothetically. The complaint alleged no actual damages, the district court permitted no testimony of actual damages beyond offers of proof, and the judgment included no award for actual damages. It is only punitive damages which the complaint requested and the district court granted.

The case for jury determination of punitive damage awards has even less merit than the case for jury determination of actual damages. At least, when juries are required by statute or common law in actions seeking actual damages there is work for the jury as a fact-finder. The jury must determine whether there are "actual" damages, and must determine whether one party's unlawful behavior is the proximate cause of the other party's injury. There are no equivalent findings to be made in a case involving punitive damages. If this were a common tort action, it might be necessary to find that the defendants acted "maliciously" or "wantonly." But this is an action pursuant to a statute which provides that "the court may award . . . not more than \$1000 punitive damages . . ." as a remedy for violation of a statute which requires no finding of malice.⁴⁶ Therefore, beyond the findings of fact necessary

⁴⁶ In *Newman v. Piggie Park Enterprises*, 390 U.S. 400, this Court considered a related problem in construing the attorney's fee provision in Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(b), which provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . ." The Court rejected the traditional rule limiting award of attorney's fees to cases of "bad faith" defenses:

If Congress' objective had been to authorize the assessment of attorney's fees against defendants who make completely

to sustain a judgment that the Act has been violated—findings which would have to be made in an action for injunctive relief only—no further findings are necessary to authorize an award of punitive damages.

The court of appeals found it "highly unusual" for a federal statute to authorize punishment without a jury trial (20a). Yet, judges in patent infringement actions have long had the power to punish by trebling actual damages.⁴⁴ Although juries may determine actual damages in many of these cases, nevertheless, judges not juries decide whether to punish, and at times Congress has conferred on courts of equity both the power to decree accounts without juries and treble damages in their discretion.⁴⁵

Moreover, nothing in our common law tradition precludes the infliction of limited money punishments without juries. If Congress had chosen to make discrimination an offense punishable by a \$1000 fine only, but no term in prison, the Constitution would not require a jury trial.⁴⁶ It would be an odd historical result to require a jury to award \$1000

groundless contentions for purposes of delay, no new statutory provision would have been necessary, for it has long been held that a federal court may award counsel fees to a successful plaintiff where a defense has been maintained 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'

Id. at 402 fn. 4. Similarly, a new statutory provision would not have been necessary to authorize a punitive damage award for malicious or wanton behavior, and Title VIII should not be read to require a finding of malice.

⁴⁴ *Seymour v. McCormick*, 57 U.S. (16 How.) 480, 489; *Kennedy v. Lakso Co.*, 414 F.2d 1249, 1254 (3rd Cir. 1969); *Swofford v. B & W, Inc.*, 336 F.2d 406, 413 (5th Cir. 1964), cert. denied, 379 U.S. 962.

⁴⁵ *Tilgham v. Proctor*, 125 U.S. 136, 148-49; *Filer & Stowell Co. v. Diamond Iron Works*, 270 F. 489 (7th Cir. 1921).

⁴⁶ *Argersinger v. Hamlin*, 407 U.S. 25, 45 fn.2 (concurring opinion).

punitive damages, while a judge alone could impose a \$1000 fine.

Finally, the role of punitive damages in the enforcement of the fair housing law should be considered. Often they are an essential complement to a court's injunctive power. Fair housing cases present myriad situations to district courts. There are times when the coercive effect of injunctions may be sufficient to assure compliance with the law. There are also times when it may be preferable to coerce future compliance with a present award of punitive damages in place of the ongoing supervision which an injunction may require. There are other times when a combination of injunction and punitive damages may best assure the effectiveness of the Act. Congress decided it would be appropriate to enforce the right to fair housing by giving one decision maker an array of powers which could be used individually or in combination as necessary to enforce the Act in particular circumstances. In this light, punitive damages under Title VIII are best seen as an adjunct to the district court's equitable powers to coerce compliance with this important statute.

IV.

The Decision of the Seventh Circuit Conflicts in Principle With Decisions in Other Circuits on the Right to Juries in Related Civil Rights Actions.

Other courts of appeals have uniformly rejected demands for juries in employment discrimination cases. Some of these actions were under Title VII of the Civil Rights Act of 1964,⁴⁰ and others under 42 U.S.C. § 1983.⁴¹ All sought injunctive relief and money awards to compensate for lost pay, and in all the courts held that back pay awards were part of an equitable remedy.

The decision of the Seventh Circuit seriously jeopardizes this heretofore unbroken line of cases. The court below attempts to distinguish them by analogizing the award of lost pay to the restitution of "ill-gotten gains" (29a), but another court has already exposed the fragile basis of characterizing back pay as a uniquely equitable remedy by showing that a common law lawyer would have had no trouble placing back pay under the rubric of indebitatus assumpsit or an action for breach of contract by wrongful discharge.⁴² Whether these statutorily authorized money

⁴⁰ *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969); *cf. Robinson v. Lorillard Corporation*, 444 F.2d 791, 802 (4th Cir. 1971). Even "the use of advisory juries in discrimination cases is not favored. . . ." *Moss v. The Lane Company*, No. 72-1628 (4th Cir., Jan. 11, 1973).

⁴¹ *McFerren v. County Board of Education*, 455 F.2d 199 (6th Cir. 1972); *Harkless v. Sweeny Independent School District*, 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991; *Smith v. Hampton Training School*, 360 F.2d 577 (4th Cir. 1966). The Equal Employment Opportunity Act of 1972, Pub. L. 92-261, § 2 (1), now makes it possible to bring employment discrimination cases involving government employers under Title VII.

⁴² *Ochoa v. American Oil Co.*, 338 F.Supp. 914, 918 (S.D. Tex. 1972).

awards are called "actual damages" or "back pay" their purpose is to remedy an injury caused by unlawful conduct by making victims "whole." ¹²

The determination whether or not juries are required cannot depend on a tenuous labeling of money damages as equitable or legal. Rather, it depends on whether Congress has the power to authorize federal judges not only to order injunctive relief but also award money damages to provide complete relief in enforcing civil rights legislation. The decision of the Seventh Circuit that Congress lacks this power conflicts at least in principle and effect with decisions of other circuits. It would be appropriate for this Court to resolve this conflict and provide authoritative guidance to lower federal courts in their administration of the civil rights laws.

¹² *Bowe v. Colgate-Palmolive Company*, 416 F.2d 711, 721 (7th Cir. 1969).

CONCLUSION

The writ of certiorari should be granted.

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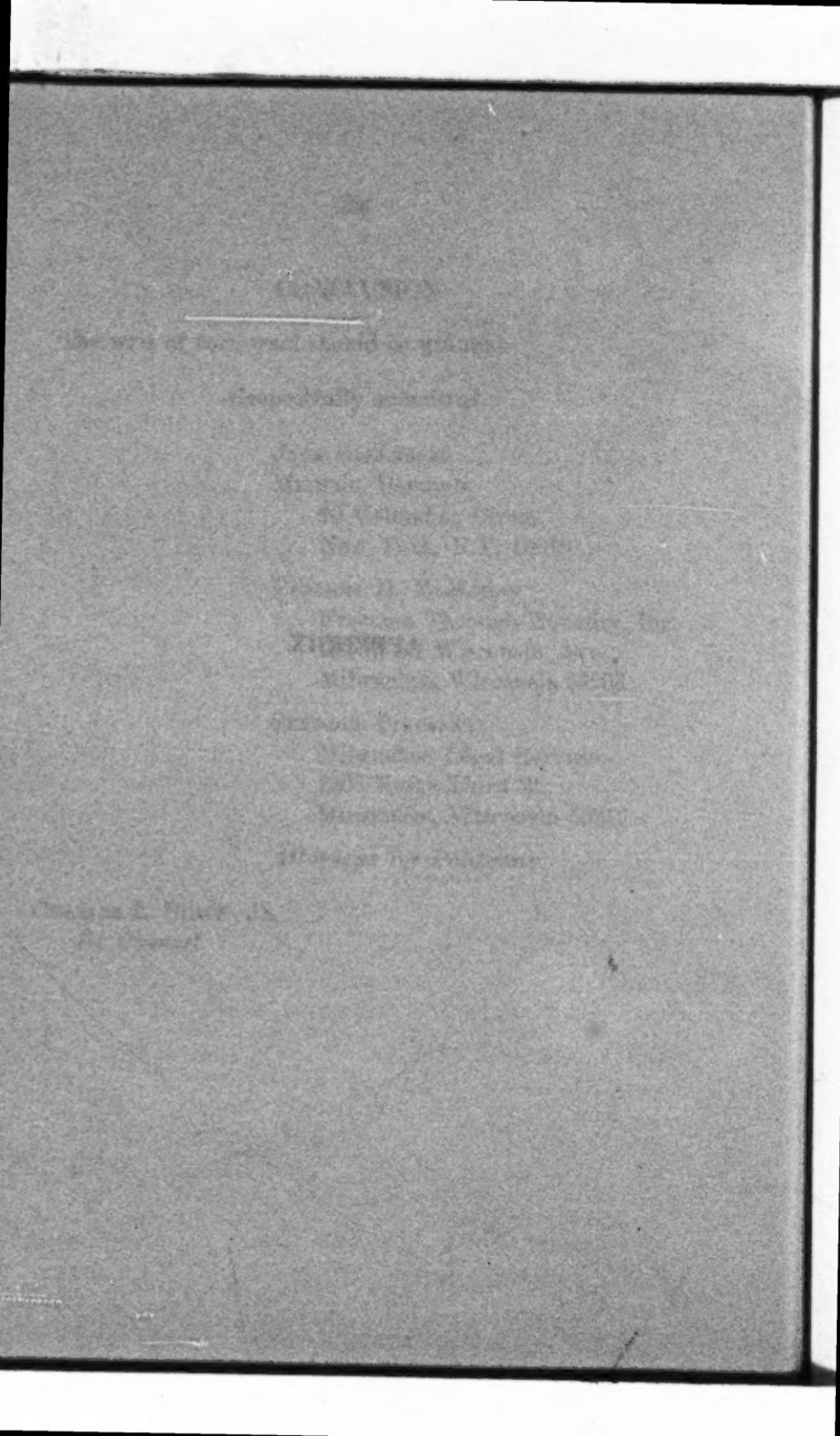
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APPENDIX



**District Court's Opinion and Order
Denying Demand for Jury Trial**

May 19, 1970

REYNOLDS, District Judge.

This is an action brought under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619, which prohibits discrimination in the rental of housing. Plaintiff claims that defendants discriminated against her by refusing to rent her an apartment because she is a Negro. Plaintiff requested injunctive relief restraining the rental of the subject apartment except to the plaintiff, money damages for loss incurred by the plaintiff due to the alleged discrimination, punitive damages in the amount of \$1,000, and attorney's fees.

The court granted plaintiff's motion for a temporary restraining order on November 17, 1969, and, following an extended hearing, entered a preliminary injunction temporarily restraining the rental of the apartment pending final determination of the case. At a hearing on April 30, 1970, the Court, with consent of plaintiff, dissolved the preliminary injunction. Therefore, the only issues remaining in the suit are plaintiff's claim for compensatory and punitive damages and attorney's fees.

The defendants have requested a jury trial on these issues, and plaintiff has objected to this request. The parties have submitted briefs and argued to the court on this issue which is now before the court for decision.

[1, 2] To warrant a jury trial, a claim must be of such a nature as would entitle a party to a jury at the time of the adoption of the Seventh Amendment. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed.

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893 (1936); *United States v. Louisiana*, 339 U.S. 699, 70 S.Ct. 914, 94 L.Ed. 1216 (1950). The question before this court, therefore, is whether the cause of action under 42 U.S.C. §§ 3601-3619 is one recognized at common law which consequently requires a jury trial. I find that this cause of action is a statutory one invoking the equity powers of the court, by which the court may award compensatory and punitive money damages as an integral part of the final decree so that complete relief may be had. The action is not one in the nature of a suit at common law, and therefore there is no right to trial by jury on the issue of money damages in the case.

Defendant argues that the Seventh Amendment of the Constitution; *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959); *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486 (5th Cir. 1961); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962); *Harkless v. Sweeny Independent School District*, 278 F.Supp. 632 (S. D. Texas 1968); and *Ross v. Bernhard*, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970), require a jury trial on the issue of plaintiff's prayer for money damages due to the alleged discrimination.

Beacon, *Dairy Queen*, and *Thermo-Stitch* hold that where equitable and legal claims are joined in the same cause of action, there is a right to trial by jury on the legal claims that must not be infringed by trying the legal issues as incidental to the equitable issues or by a court trial of common issues between the two. The Court in *Swofford v. B & W, Inc.*, 336 F.2d 406, 414 (5th Cir. 1964), commented on these cases:

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*** This is not to say, however, that they have converted typical non-jury claims, or remedies, into jury ones. Therefore, we reject a view that the trio of Beacon Theatres, Dairy Queen, and Thermo-Stitch is a catalyst which suddenly converts *any* money request into a money claim triable by jury."

The *Harkless* court granted a jury trial on the issue of back pay award in an action brought under 42 U.S.C. § 1983 seeking reinstatement as teachers following a discharge allegedly based on racial discrimination. However, § 1983 expressly provides that persons acting under color of state law who deprive other persons of constitutional rights shall be liable "in an action at law." There is no such provision in 42 U.S.C. § 3612(c).

The Supreme Court in *Ross* held that plaintiffs in a shareholder's derivative action had a right to a jury trial on those issues to which the corporation, had it brought the action itself, would have had the right to a jury trial. The Court found that where the claims asserted were damages against the corporation's broker under the brokerage contract and rights against the corporate directors because of their negligence, both actions at common law, *** it is no longer tenable for a district court, administering both law and equity in the same action, to deny legal remedies to a corporation, merely because the corporation's spokesmen are its shareholders rather than its directors. *** 396 U.S. at 540, 90 S.Ct. at 739. While *Ross* may reflect "an unarticulated but apparently overpowering bias in favor of jury trials in civil actions," *Ross, supra*, at 551, 90 S.Ct. at 745, Justice Stewart dissenting, the case does

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not stand for the proposition that any money claim in a cause of action must be tried by a jury. The decision deals narrowly with the right to jury trial in a shareholder's derivative action and is clearly distinguishable from the case before this court.

The section of the statute dealing with remedies for violation of the act, 42 U.S.C. § 3612(c), provides:

"(c) *The court* (emphasis added) may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than \$1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, That the said plaintiff *in the opinion of the court* (emphasis added) is not financially able to assume said attorney's fees."

On its face, this statutory language seems to treat the actual damages issue as one for the trial judge rather than a jury. District courts in *Hayes v. Seaboard Coast Line Railroad Co.*, 46 F.R.D. 49 (S.D.Ga.1969), and *Cheatwood v. South Central Bell Telephone and Telegraph Co.*, 303 F.Supp. 754 (M.D.Ala. 1969), have construed similar language in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g),* to mean that the issue of back pay

* "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, *the court* may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may

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award in employment discrimination cases does not require jury determination.

Both *Hayes* and *Cheatwood* held that the money damages issue of back pay in an action under 42 U.S.C. § 2000e-5(g) of the 1964 Civil Rights Act was not a separate legal issue, but rather was a remedy the court could employ for violation of the statute in a statutory proceeding unknown at common law, and that there was no right to a trial by jury on that issue. As I have noted, the language of the remedial provisions of 42 U.S.C. § 2000e-5(g) of the Civil Rights Act of 1964 and 42 U.S.C. § 3612(c) of the Civil Rights Act of 1968 are very similar. The purpose of the two acts is similar. Title VII of the 1964 Act prohibits discrimination on the basis of race, color, religion, sex, or national origin by specified groups of employers, labor unions, and employment agencies. Title VIII of the 1968 Act prohibits discrimination on the basis of race, color, religion, or national origin in the sale or rental of housing by private owners, real estate brokers, and financial institutions. The award of money damages in a Title VIII action has the same place in the statutory scheme as does the award of back pay in a Title VII action. Determining the amount of a back pay award in a Title VII action can be as difficult a question of fact as determining the amount of money damages in a Title VIII action. *Hayes*, 46 F.R.D. at 53.

An action under Title VIII is not an action at common law. The statute does not expressly provide for trial by

include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). * * * (Emphasis added.)

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jury of any issues in the action. In the absence of a clear mandate from Congress requiring a jury trial, I find that the similarities between the remedial provisions of the Civil Rights Act of 1964 and 1968, in light of the undivided authority holding that the issue of money damages for back pay under Title VII of the 1964 Act is not an issue for the jury, compel the conclusion that the issue of compensatory and punitive money damages in an action under Title VIII of the 1968 Act is likewise an issue for the court. Accordingly, defendants' request for a jury trial must be denied.

Therefore, it is ordered that defendants' request for a jury trial be and it hereby is denied.

**District Court's Oral Findings of
Fact and Conclusions of Law**

October 27, 1970

[205] * * *

The Court: All right. Well, this has been a long and tortuous lawsuit. The action was brought under Title VIII of the Civil Rights Act of 1968, 42 U.S. Code Section 3601-19 which prohibits discrimination in the rental of housing. The Plaintiff has claimed that she was discriminated against by the Defendants in that they refused to rent her an apartment because she was a Negro. The Plaintiff has requested injunctive relief restraining the rental of the apartment except to her, money damages for loss that she has sustained due to the alleged discrimination and punitive damages in the amount of \$1,000 and attorney's fees.

I granted the Plaintiff's motion for temporary restraining order on November 17th, 1969 following an extended hearing, entered a preliminary injunction temporarily restraining the rental of the apartment pending final determination of the Court. At that time, [206] of the preliminary hearing, I found there was probable cause to believe there was discrimination in this case and that she could probably establish that on a final hearing.

The Court had many conferences with the parties trying to work this out. But to no avail. And at one of those, on the hearing of April 30th, 1970, the Court with the consent of the Plaintiff dissolved the preliminary injunction because by that time the Plaintiff was no longer interested in the apartment. Therefore, the only issue remaining for this hearing today, yesterday and today, was for the claim—the final hearing on the question of

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discrimination and the claim for compensatory and punitive damages and attorney's fees.

It appears that on, from the evidence and the entire file and both hearings, October 30, 1969 an advertisement appeared in the Milwaukee Journal, a newspaper published in this city offering for rent this apartment which was located at 2529 North Fratney Street, Milwaukee, Wisconsin. And it appears that Plaintiff Julia Rogers is a black American and Miss Jacqueline Haessly is Caucasian, and the Defendants are at least white, I don't know if they are Caucasian, I never know what these things are, but they are white. At the time the ad appeared in the paper, Mrs. Rogers was hospitalized [207] at St. Mary's Hospital here in Milwaukee. The ad was seen by her friend, Miss Haessly, who called the number given and spoke to the Defendant Mrs. Perez. She asked Mrs. Perez if it would be possible to see the apartment and Mrs. Perez told her she could come over if she could get there by 5:00 p.m. of that day. Miss Haessly went to see the apartment, arriving there at 4:30 p.m. on October 30th, 1969. Mrs. Perez is a cousin of Mrs. Loether and Mrs. Perez took Miss Haessly to see the upstairs apartment. Miss Haessly told Mrs. Perez that she was looking for a place for a friend of hers who was in the hospital. Mrs. Perez stated that Mr. and Mrs. Loether were coming over that evening, that they would have to make the decision as to whether or not Miss Haessly could have the apartment for Mrs. Rogers. Miss Haessly stated that she was very interested in obtaining the apartment and asked Mrs. Perez if she, that is Mrs. Haessly, should offer a deposit, and would the deposit be accepted. Mrs. Perez told Miss Haessly that she would call Mrs. Loether and Mrs. Loether was in fact called and

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Miss Haessly spoke to Mrs. Loether and to find out whether or not a deposit would be accepted.

It appears that in that conversation, Mrs. Loether asked various questions about Mrs. Rogers, such as where she was hospitalized, how many children in the [208] family, marital status and financial status, but in any event, did not ask about race, and Mrs. Loether then asked to speak to Mrs. Perez and Mrs. Perez as a result of these conversations was authorized by Mrs. Loether to accept a deposit and to give a receipt. At least she did accept a deposit and she did give a receipt.

And up until that time, there was no problem. I think up until that time, there is no question in my mind, that the apartment was rented, at least effectively rented. Then Mrs. Loether requested Mrs. Haessly and was given the hospital room number and she talked to Mrs. Rogers and then she called Mrs. Rogers at the hospital and discussed the rental of the apartment at which time Mrs. Rogers advised Mrs. Loether that she, Mrs. Rogers, was a black person. Then for the first time the question of race came up and Mrs. Loether became concerned about the race of the prospective tenant and, as I see it, the rental of the apartment was revoked at that stage and it was revoked because of race, at which time Miss Haessly came back into the picture and made it clear to Mrs. Loether that that was against the law, she could not do that. And the testimony indicates it was about this time that Mr. Loether came in and also learned that he was told that he had to rent this apartment to someone that he didn't want to rent it to, and that he believed that no one is going to tell him

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what to do. Well, that is a difficult question. I think that the law does tell him what to do. And he may find that very difficult to accept. But it is the law nevertheless. The deal was closed, it was effectively closed. Mrs. Perez in effect became the agent of these people to rent the apartment. She rented the apartment and then the deal, after it was closed, when race was mentioned, it was revoked and then I think that the acts of Miss Haessly in telling them—I am not saying she didn't have a right to do this, but I think her act of telling the Loethers that they had to rent it probably hardened their position. In short, I think but for the race of Mrs. Rogers, she would have had the apartment, because that was the only question these people were talking about from that time on. They haven't discussed anything else really.

I don't believe it's necessary for me to go into all the details—well, I might as well. In any event, Mrs. Loether who then actually went to see Mrs. Rogers at the hospital, to see if they could work out something, but it turned out that that could not be worked out.

I am also mindful of the fact that Mr. Loether, being a little stubborn about this, and I do not look [210] upon the Loethers certainly as the worst and most bigotted people I have come in contact with in this world, and that is what makes this case more difficult than some. Now, we get to the questions—although I am satisfied that there is only one conclusion I can reach and that is the apartment was not rented because of the race of Mrs. Rogers and therefore it's a violation of the Federal law.

*District Court's Oral Findings of
Fact and Conclusions of Law*

Now, we come to the questions of damages. The Loethers have indicated or did indicate they were willing to rent this to a black person but they consistently maintained the position they were not willing to rent it to Mrs. Rogers, and therefore I think that that—here we are interested in Mrs. Rogers' rights, but I recognize the property was vacant for an extended period of time and the Loethers have been subjected to a lot of expenses. I do not believe there have been any compensatory damages proven in this case or out-of-pocket expenses of that nature, but I do think that an award of \$250 in punitive damages will be in order. It probably takes the wisdom of a Solomon to decide these cases fairly, but that is the best I can do. And I think under all the circumstances, I am not going to award—I know Milwaukee Legal Services is very interested in establishing the position that they should [211] be entitled to attorney's fees in these matters and maybe they should in the proper case, but considering everything in this case, I am just not going to award any attorney's fees and costs.

Thank you, gentlemen.

Mr. Tucker: If Your Honor please,—

The Court: You may draft an order in accordance with this opinion.

Mr. Tucker: I was wondering about the costs. You are not awarding costs?

The Court: No.

Mr. Tucker: Very well, sir.

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12a

Judgment of District Court

December 7, 1970

This action came on for trial before the Court, Honorable John W. Reynolds, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is ORDERED AND ADJUDGED that the plaintiff, Julia Rogers, recover of the defendants, LeRoy Loether, Mariane Loether and Mrs. Anthony Perez \$250.00 as punitive damages; further ordered, that compensatory-actual damages, costs and attorney's fees are hereby denied.

Opinion of Court of Appeals

In the

United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1971

JANUARY SESSION, 1972

No. 71-1145

JULIA ROGERS,

Plaintiff-Appellee,

v.

LEROY LOETHER and MARIAINE
LOETHER, his wife and Mrs.
ANTHONY PEREZ,

Defendants-Appellants.

Appeal from the
United States District Court for the
Eastern District of
Wisconsin.

No. 69-C-524

JOHN W. REYNOLDS,
Judge.

ARGUED FEBRUARY 22, 1972 — DECIDED SEPTEMBER 29, 1972

Before SWYGERT, *Chief Judge*, STEVENS, *Circuit Judge*,
and CAMPBELL, *District Judge*.*STEVENS, *Circuit Judge*. The question presented is whether appellant was entitled to a jury trial in an action for compensatory and punitive damages brought under § 812 of the Civil Rights Act of 1968, 42 U.S.C. § 3612.¹

In her complaint, plaintiff alleged that the three defendants had refused to rent her an apartment because of

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

¹ Section 812 provides, in part:

"(a) The rights granted by sections 803, 804, 805, and 806 may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action

Opinion of Court of Appeals

her race.² She requested injunctive relief restraining defendants from renting the apartment to anyone else, money damages for her actual losses, punitive damages of \$1,000, and attorney's fees.

The district court, after an extended hearing, entered a preliminary injunction. Subsequently, with plaintiff's consent, the injunction was dissolved; thereafter only plaintiff's claims for compensatory and punitive damages and attorney's fees remained. Defendants' request for a jury trial of those issues was denied. After trial, the court found that plaintiff had suffered no actual damages but assessed punitive damages of \$250; the prayer for attorney's fees was denied.

On appeal defendants contend that the finding of discrimination is clearly erroneous, that it was error to award punitive damages, and that they were entitled to a jury trial. We shall not describe the evidence of discrimination except to note that it was marginal; whichever way the trial judge had ruled, his determination of that issue would not have been clearly erroneous.³ We are also

¹ (Continued)

shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred:

"(c) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than \$1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: Provided, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees." 82 Stat. 88, 42 U.S.C. § 3612.

² Section 804 of the 1968 act provides, in part:

"As made applicable by section 803 and except as exempted by sections 803(b) and 807, it shall be unlawful—

"(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin." 82 Stat. 83, 42 U.S.C. § 3604.

³ Defendants contend that their refusal was motivated by the obnoxious behavior of a white social worker who was helping the plaintiff find an apartment; they had offered to rent the apartment to any black tenant other than the plaintiff and offered considerable evidence of absence of racial prejudice by either themselves or other tenants in the apartment. On the other hand, plaintiff's evidence tended to indicate that negotiations proceeded smoothly until defendants learned that plaintiff was a Negro.

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satisfied that if his finding of discrimination is accepted, an award of punitive damages was authorized by the statute notwithstanding the absence of any actual loss to the plaintiff.* We shall confine our analysis to the jury trial issue.

The district court held that a jury trial was not required by the Seventh Amendment* or by a fair interpretation of the statute.*

The court rejected the constitutional claim on the grounds (1) that the cause of action was created by statute and not recognized at common law; and (2) that the statutory claim invoked the equitable powers of the court and the amendment has no application to the recovery of money damages as an incident to complete equitable relief. Both propositions are supported by *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49.¹

The district court also considered the award of damages in a housing discrimination case arising under the 1968 Act analogous to an award of back pay in an employment discrimination case under the Civil Rights Act of 1964 and therefore relied on cases holding that there is no right to a jury trial in such litigation.* In its opinion the district court placed no reliance on the argument, sometimes advanced by proponents of civil rights legislation, that al-

* As we read the statute it does not require a finding of actual damages as a condition to the award of punitive damages. In any event, in other litigation the federal courts have held that punitive damages may be awarded without requiring an award of compensatory damages. See, e.g., *Wardman-Justice Motors, Inc. v. Petrie*, 39 F.2d 512, 516 (D.C. Cir. 1930); *Basista v. Weir*, 340 F.2d 74, 85-88 (3rd Cir. 1965). The *Basista* case involved a suit against policemen for punitive damages under the Civil Rights Act of 1871, 42 U.S.C. § 1983.

¹ "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." United States Constitution, Amendment VII.

* The opinion is reported at 312 F. Supp. 1008.

² The district court also cited *United States v. Louisiana*, which holds that the Seventh Amendment is "applicable only to actions at law." 339 U.S. 699, 705.

³ *Hayes v. Seaboard Coast Line R.R.*, 46 F.R.D. 49 (S.D. Ga. 1970); *Cheatwood v. South Central Bell Tel. & Tel. Co.*, 303 F. Supp. 754 (M.D. Ala. 1969).

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lowance of a jury trial might undermine effective enforcement of the statute."

Our study of the issue persuades us that (1) the constitutional right to trial by jury applies in at least some judicial proceedings to enforce rights created by statute; (2) this action for damages is "in the nature of a suit at common law";¹⁰ (3) the nature of the claim is "legal" within the test identified in *Ross v. Bernhard*, 396 U.S. 531, 538; (4) the right to a jury trial may not be denied on the ground that the damage claim is incidental to a claim for equitable relief; (5) cases involving an award of back pay pursuant to the 1964 Act are inapplicable; and finally (6) in view of our grave doubts as to the constitutionality of a denial of the right to a jury trial and the failure of Congress expressly to indicate that the traditional procedure for litigating damage claims should not be followed, the statute should be construed to authorize trial by jury. Accordingly, we have decided to reverse.

I.

The Seventh Amendment preserves the substance of the right to a jury trial which existed under English common law when the amendment was adopted.¹¹ It has never been suggested that the application of the amendment is narrowly confined to such common law writs as might be enforceable in a federal court. On the contrary, since the bulk of the civil litigation in the federal judicial system involves the assertion of a federal right derived either from an act of Congress or the Constitution itself, necessarily the principal significance of the Seventh Amend-

¹⁰ See, e.g., mention of such factors in Note, *Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws*, 69 Colum. L. Rev. 1019, 1051; Comment, *The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964*, 37 U. Chi. L. Rev. 187; *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1108, 1284. Among the cases, see *Hayes v. Seaboard Coast Line R.R.*, 46 F.R.D. 49, 53 (S.D. Ga. 1970); *Leuton v. Nightingale*, ..., F. Supp. ..., 41 U.S.L.W. 2041 (D.C. Ohio, June 27, 1972).

¹¹ See *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. at 48.

¹² *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657.

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ment has been in such cases.¹² It is perfectly clear that the fact that a litigant is asserting a statutory right does not deprive him or his adversary of the protection of the amendment.

In *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, Mr. Justice Story, writing for the Court, rejected the contention expressed by Mr. Justice M'Lean in dissent that the amendment was inapplicable because the claim arose not under the common law but rather under the statutes of Louisiana.¹³ Mr. Justice Story focused on the character of the claim as a "legal right" and eloquently described the purpose of the amendment:

"The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into, and secured in every state constitution in the union; and it is found in the constitution of Louisiana. One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by Congress; and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people. This amendment declares, that 'In suits at common law, where the value in controversy shall

¹² "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment." *Jacob v. New York City*, 315 U.S. 752.

¹³ "It is not strictly a common law proceeding; but a proceeding under the peculiar system of Louisiana;

"In the state of Louisiana, the principles of common law are not recognized; neither do the principles of the civil law of Rome furnish the basis of their jurisprudence. They have a system peculiar to themselves, adopted by their statutes, which embodies much of the civil law, some of the principles of the common law, and, in a few instances, the statutory provisions of other states. This system may be called the civil law of Louisiana, and is peculiar to that state." 28 U.S. at 449-450 (Mr. Justice M'Lean dissenting).

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exceed twenty dollars, the right of trial by jury shall be preserved; and no fact once tried by a jury shall be otherwise re-examinable in any Court of the United States, than according to the rules of the common law.' At this time there were no states in the union, the basis of whose jurisprudence was not essentially that of the common law in its widest meaning; and probably no states were contemplated, in which it would not exist. The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. . . . By common law, they meant what the constitution denominated in the third article 'law,' not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those, where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit. Probably there were few, if any, states in the union, in which some new legal remedies differing from the old common law forms were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified. In a just sense, the amendment then may well be construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." 28 U.S. at 445-446.

In an unbroken line of cases involving enforcement of statutory rights, the Supreme Court has treated the right to a jury trial as a matter too obvious to be doubted. Thus, in a civil action to recover a statutory penalty for a violation of the immigration laws, the first Mr. Justice Harlan, speaking for the Court, said that the "defendant was, of course, entitled to have a jury summoned in this case." *Hepner v. United States*, 213 U.S. 103, 115. In an action for treble damages under § 7 of the Sherman Act,

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Mr. Justice Holmes, also speaking for a unanimous Court, considered it plain that "the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law." *Fleitmann v. Welsbach Co.*, 240 U.S. 27, 29. In a case alleging violation of the Safety Appliance Act of 1910, which did not expressly authorize a private remedy, the Court found an implied right to recover damages in a jury trial "according to a doctrine of the common law." *Texas & Pacific Ry. v. Rigsby*, 241 U.S. 33, 39. In a case involving an ambiguous claim for damages, either as an amount due under a contract or as a statutory claim for damages for trademark infringement, the Court held that the claim was "wholly legal in its nature however the complaint is construed" and that the "constitutional right to trial by jury" was applicable to the claim. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477. And in an action brought under § 4 of the Clayton Act, the Court has expressly characterized the right to a jury trial as "constitutional." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510.¹⁴

N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49, does not hold—as is sometimes assumed—that no jury trial is required in a cause of action created by statute since any such action would have been unknown to the common law and therefore beyond the reach of the Seventh Amendment. The *Jones & Laughlin* opinion expressly recognizes that the amendment is applicable not only to a suit at common law, but also to a judicial proceeding "in the nature of such a suit." The distinction drawn in the opinion is not between substantive rights derived from the common law as opposed to those created by statute;

¹⁴ "Since the right to a jury trial is a constitutional one, however, while no similar requirement protects trial by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial." *Id.* at 510.

It is of interest that in the elaborate argument presented to us in *Dasho v. Susquehanna Corp.*, 461 F.2d 11 (7th Cir. 1972), cert. denied, U.S. ___, 40 U.S.L.W. 3617 (June 26, 1972), in which the decision turned on the constitutional right to a jury trial in an action asserting rights under § 10(b) of the Securities Act of 1934, none of the defendants even suggested that the statutory source of plaintiffs' claim affected their right to demand a jury.

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it is the difference between a proceeding "in the nature of a suit at common law" and a "statutory proceeding."¹⁵

The Court's reference to a "statutory proceeding" rather than to a judicial proceeding brought to redress a right created by statute is important. Cases such as *Parsons v. Bedford* and *Fleitmann v. Welsbach Co.* were such judicial proceedings, and their teaching is not undermined in the slightest by the *Jones & Laughlin* holding. The procedure approved by *Jones & Laughlin* was, of course, fundamentally different from a common law trial. It was administrative rather than judicial and did not invoke the original jurisdiction of a court in determining factual issues or fashioning a remedy. The initial case was not "tried" in a court of law or equity; it was "tried" in a separate proceeding created by statute.¹⁶

¹⁵ The Court's entire discussion of the Seventh Amendment issue occupies less than one page of a 27-page opinion. That page includes the Court's discussion of both the historic view that no jury is required if the recovery of damages is an incident to equitable relief (a proposition discussed in part IV of this opinion) and to the statutory proceeding point. The Court said:

"The Amendment thus preserves the right which existed under the common law when the Amendment was adopted. *Shields v. Thomas*, 18 How. 253, 262; *In re Wood*, 210 U. S. 246, 258; *Dimick v. Schiedt*, 293 U. S. 474, 476; *Baltimore & Carolina Line v. Redman*, 295 U. S. 654, 657. Thus it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law. *Clark v. Wooster*, 119 U. S. 322, 325; *Pease v. Rathbun-Jones Engineering Co.*, 243 U. S. 273, 279. It does not apply where the proceeding is not in the nature of a suit at common law. *Guthrie National Bank v. Guthrie*, 173 U. S. 528, 537.

"The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit." 301 U. S. at 48-49. (Emphasis added.)

¹⁶ That this is what the Court meant when it referred to a "proceeding . . . not in the nature of a suit at common law" (emphasis added) is clear from the case which it cites to support the statement, *Guthrie National Bank v. Guthrie*, 173 U.S. 528. In that case a territorial legislature set up a special commission that did not include a jury to hear certain claims against a municipality. The claims had no legal force, but the legislature thought it equitable to provide for their payment in appropriate cases. While a court became involved in approving or disapproving the recommendations of the commission, it is clear that the proceeding, and not merely the right to relief, was statutory. See *Developments*, *supra* note 2, 84 Harv. L. Rev. at 1266-1268.

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Here there is no statutory proceeding. The statute authorizes a "civil action" in the courts of the United States. The rights protected and the relief available are set forth in the statute, but the proceeding is not statutory in the *Jones & Laughlin* or *Guthrie*¹⁷ sense.¹⁸ The issue we must consider, therefore, is whether an action for damages authorized by the Civil Rights Act of 1968 is, in the language of *Jones & Laughlin*, "in the nature of a suit at common law."

II.

There are three reasons why this action is the kind of case which is appropriately described as in the nature of a suit at common law.

First, the tribunal whose jurisdiction is invoked is a court created pursuant to Article III of the Constitution. Unquestionably, congressional power to prescribe the procedures to be employed in such a court is limited by the Constitution and specifically by the Seventh Amendment.¹⁹ The proceeding is judicial in character rather than administrative or "statutory." In all respects—at least all except the right to a jury trial if our appraisal of that right is not correct—it is clear that the procedure to be

¹⁷ See note 16, *supra*.

¹⁸ In making a similar analysis of *Jones & Laughlin* in the context of a damage remedy for employment discrimination under Title VII of the Civil Rights Act of 1964, one commentator drew this conclusion: "The Court there held that a jury trial was not required in a 'statutory proceeding'; its concern was to protect the comprehensive administrative scheme of the NLRB, which would have been substantially destroyed if jury trials were required. The relevant distinction thus appears to be between those statutory actions which invoke an administrative process and those which do not. If the Congress makes a judgment that a comprehensive scheme of administrative adjudication is required, the Court will be willing to find that it is a 'statutory proceeding' to which the seventh amendment has no application. If, however, a statutory claim is entrusted to court decision, where there is no functional justification for not granting a jury trial, and the claim is for the type of relief normally awarded by a court of law, as would be the case in an action for compensatory damages under Title VII, the similarity to common law forms of action will require a jury trial." Developments, *supra*, note 9, 84 Harv. L. Rev. at 1267-1268.

¹⁹ In *Minneapolis & St. Louis R.R. v. Bombolis* the Court expressly noted that "the Seventh Amendment is controlling upon Congress." 241 U.S. 211, 219.

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followed in this case is precisely that which is applicable to suits at common law which are tried in the federal judicial system.

Second, the remedy sought, including both compensatory and punitive damages, is the relief most typical of an action at law. If, as the scholars have consistently indicated, we should look to history for guidance in determining whether or not a claim is of the kind which is triable to a jury,²⁰ unquestionably, the prayer for damages points to that result.²¹

Finally, the nature of the substantive right asserted, although not specifically recognized at common law, is analogous to common law rights. An English innkeeper who refused, without justification, to rent lodgings to a traveler was apparently liable in an action at law triable to a jury.²² Refusing to rent an apartment on the false ground

²⁰ The proposition that we should look to history for guidance is well settled. See 5 Moore's Federal Practice ¶ 38.11 [7]; 9 Wright and Miller, *Federal Practice and Procedure*, Civil § 2302; James, *Civil Procedure* § 8.1 at p. 338 (1965). Even the dissenters in *Ross v. Bernhard* agreed, 396 U.S. 531, 543 n.1.

²¹ Damages, of course, were traditionally awarded in legal actions to compensate a plaintiff for a breach of a legal duty owed him by defendant. That duty may be prescribed by the common law (e.g., the tort law of negligence), by contract or by statute. The origin of the duty does not necessarily determine the nature of the suit. In *Texas & Pacific Ry. v. Rigsby*, 241 U.S. 33, for example, the Court found an implied remedy for damages for violation of the duty placed upon defendant by the Safety Appliance Act. The case was tried to a jury.

In concluding that a jury trial was required in a suit seeking damages under the Labor-Management Reporting and Disclosure Act of 1959, the Fourth Circuit said in part:

"The right asserted is indeed one created by statute, but we do not agree that a jury trial is necessarily unavailable because the suit for damages is one to vindicate a statutory right. There is no such cleavage between rights existing under common law and rights established by enacted law, where the relief sought is an award of damages." *Simmons v. Avisco, Local 713, Textile Workers Union*, 350 F. 2d 1012, 1018 (1965).

²² "Thus innkeepers, who have nowhere been described as public utilities, have from early times been subject to the obligation to receive and afford proper entertainment to every one who offers himself as a guest, if there be sufficient room for him in the inn, and no good reason for refusing him." *Davies Warehouse Co. v. Brown*, 137 F.2d 201, 207 (Emerg. Ct. App. 1943), and cases there cited. *Davies* was reversed on other grounds, 321 U.S. 144.

See also *Thomas v. Pick Hotels Corp.*, 224 F.2d 664, 666 (10th Cir. 1955) (common law action against innkeeper for discrimination sounds in tort); 43 C.J.S. Innkeepers, § 9 at p. 1149.

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that an applicant is an unfit tenant, when race is the real motivation is a species of defamation; libel and slander, of course, are common law causes of action. Discrimination might involve mental distress or other emotional harm, and the developing common law of torts recognizes a cause of action for the intentional infliction of emotional harm.²³ We thus conclude that a suit for damages for discrimination in the sale or rental of housing facilities is sufficiently analogous to a suit at common law to be appropriately characterized as a "legal" claim triable to a jury.

III.

Although the full implications of the Supreme Court's decision in *Ross v. Bernhard*, 396 U.S. 531, have yet to be determined, it is clear that mere analogy to history may not be sufficient to define the scope of the Seventh Amendment. In that case the constitutional right to a jury trial was held to encompass at least some claims in litigation which historically had been the exclusive province of equity. That was a derivative action brought by a shareholder in the name of a corporation. The shareholder's standing to litigate was governed by equitable principles; the corporate claim which he asserted was, at least in part, legal²⁴

²³ At common law, an innkeeper was liable in damages for insulting or abusing his guests or indulging in any conduct resulting in unnecessary physical discomfort or distress of mind. See *Odom v. East Avenue Corp.*, 178 Misc. 363, 34 N.Y.S. 2d 312 (1942), affirmed, 37 N.Y.S. 2d 491, 264 App. Div. 985 (complaint seeking damages against innkeeper for failure to serve guest in hotel restaurant because of race states common law cause of action). Professors Gregory and Kalven have suggested that the logic of the common law development of the dignitary tort might well apply in cases of racial discrimination. Gregory & Kalven, *Cases and Materials on Torts* 961 (2d ed. 1969). In addition, a racial discrimination suit might also be considered analogous to the so-called "new tort" for extreme and outrageous conduct which results in emotional harm. As to this "new tort," see *Eckensrode v. Life of America Ins. Co.*, ... F.2d ... (7th Cir. Aug. 3, 1972, No. 71-1163).

²⁴ "In the instant case we have no doubt that the corporation's claim is, at least, in part, a legal one. The relief sought is money damages. There are allegations in the complaint of a breach of fiduciary duty, but there are also allegations of ordinary breach of contract and gross negligence. The corporation, had it sued on its own behalf, would have been entitled to a jury's determination, at a minimum, of its damages against its broker under the brokerage contract and of its rights against its own directors because of their negligence. Under these circumstances it is unnecessary to decide

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History was unquestionably relevant to the Court's analysis of the question whether a jury trial was required in such a case. But, following the lead set in *Beacon* and *Dairy Queen*, the traditional treatment of the entire litigation was subordinated to the traditional characterization of particular claims. Thus, the Court had "no doubt" that a claim for money damages predicated on breach of contract or gross negligence was legal in character.

This conclusion did not rest, as it might, simply on the fact that such a claim was enforceable at common law in England in 1791. Instead, the Court identified history as only one of three criteria that should be considered in determining the "legal" nature of an issue. The other two were: "second, the remedy sought; and, third, the practical abilities and limitations of juries."²⁴ Indeed, not only did the Court identify these two additional criteria; it also implied, without expressly stating, that history may be a less reliable guide than the other two.²⁵ We have already concluded that under an historical analysis a jury trial is required in the present case; we proceed to consider the other two criteria.

Under the second and third criteria identified in *Ross v. Bernhard*, the civil rights claim asserted in this case was certainly appropriate for determination by a jury. The relief sought was actual damages and punitive damages. Both the determination of the amount which would adequately compensate a litigant for an unliquidated claim and the punitive element of the award are appropriate for jury determination. As we have already discussed, juries historically have been required where the remedy sought was damages, either compensatory or punitive.

²⁴ (Continued)

whether the corporation's other claims are also properly triable to a jury. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962).²⁶ 396 U.S. 531, 542-543.

²⁵ "As our cases indicate, the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply." 396 U.S. at 538 note 10. (Emphasis added.)

²⁶ In the preceding footnote we have emphasized the language which so implies.

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The "practical abilities and limitations of juries" obviously present no obstacle to their determination of the issues presented in these civil rights cases. Typically, the facts are not complex and decision turns on appraisals of credibility and motive. Certainly such matters are far more suitable for jury determination than complicated commercial issues that routinely arise in derivative and antitrust litigation. Thus, the third as well as the second criterion identified in *Ross v. Bernhard* strongly militates in favor of recognition of the right to a jury trial in a case of this kind.

History indicates that a jury trial is required. And if the Supreme Court adheres to its identification of two additional criteria in *Ross v. Bernhard*, both the damage relief sought and the character of the issue to be tried compel the conclusion that the litigants are entitled to a jury.

IV.

The *Jones & Laughlin* holding that the Seventh Amendment is inapplicable to an N.L.R.B. proceeding terminating in the entry of an order directing reinstatement and awarding back pay was supported not only by the Court's characterization of the proceeding as statutory, but also by reference to chancery practice in which damages could be awarded as an element of complete equitable relief.²⁷ In this case the district court also regarded the relief authorized by the 1968 Act as primarily equitable and considered it appropriate to award damages as incident to such relief.

As the case developed, the defendant's right to demand a jury was not determined until after plaintiff's claim for equitable relief had been abandoned. Nevertheless, we share the district court's view that the right to a jury trial in this kind of case may properly be tested by the character of the relief requested in plaintiff's complaint. Our decision is not predicated on the special circumstance that only the damage claims remained when defendant's demand for a jury was denied.

²⁷ See quotation from the Court's opinion in footnote 15, *supra*.

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At common law, a court of equity, in a proceeding properly before it, would hear and determine any legal issues incidental to the equitable issues and award any legal relief which might be incidental to equitable relief.²² Multiplicity of suits could thus be avoided. And if equitable relief were no longer appropriate, the chancellor might nevertheless award damages or, in his discretion, permit the complaint to be amended to state only a legal claim which would then be triable to a jury.²³

Today, however, legal and equitable issues can both be raised in one "civil action" under the Federal Rules. Thus, the avoidance of a multiplicity of suits and the desire to afford a complete remedy in one proceeding are no longer justifications for the "incidental" power of an equity court to award money damages. The right of the court, without a jury, to award "incidental" legal relief was nevertheless thought secure under the Federal Rules until the Supreme Court indicated differently in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469.

In *Beacon*, the Court upheld the petitioner's right to a jury trial of his counterclaim for treble damages under the antitrust laws which he had asserted in response to a complaint seeking, in part, equitable relief. In *Dairy Queen*, plaintiff sought injunctive relief against use of a trademark and an accounting to determine the amount due under a contract deemed breached. The district court held that the proceeding was either "purely equitable" or that any legal issues were "incidental" to the equitable issues. Mr. Justice Black, speaking for the Court, disposed of the "incidental" issue quite bluntly: "[N]o such rule may be applied in the federal courts."²⁴ Referring to *Beacon*, he wrote:

²² For purposes of our discussion of this "incidental to equitable relief" issue, we will assume, without deciding, that compensatory damages comparable to those sought herein might have been recovered in an 18th century chancery proceeding in which equitable relief appropriate when the suit was filed later became inappropriate.

²³ See generally 5 *Moore's Federal Practice*, 1 38.19[2]; 9 *Wright & Miller, Federal Practice and Procedure, Civil* § 2308, at pp. 42-43.

²⁴ 369 U.S. at 470. The complete sentence was:

"At the outset, we may dispose of one of the grounds upon which the trial court acted in striking the demand for trial by jury—based upon the view that the right to trial by jury may be lost

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"The holding in *Beacon Theatres* was that where both legal and equitable issues are presented in a single case, 'only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.' That holding, of course, applies whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not. Consequently, in a case such as this where there cannot even be a contention of such 'imperative circumstances,' *Beacon Theatres* requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury. There being no question of the timeliness or correctness of the demand involved here, the sole question which we must decide is whether the action now pending before the District Court contains legal issues."²⁰

It would appear that *Beacon* and *Dairy Queen* have mandated that once any claim for money damages is made, the legal issue—whether defendant breached a duty owed plaintiff for which defendant is liable in damages—must be tried to a jury whether or not there exists an equitable claim to which the damage claim might once have been

²⁰ (Continued)

as to legal issues where those issues are characterized as 'incidental' to equitable issues—for our previous decisions make it plain that no such rule may be applied in the federal courts." *Ibid.*

²¹ *Id.* at 472-473. Preceding the quotation in the text, the Court wrote: ". . . Rule 38(a) expressly reaffirms that constitutional principle, declaring: 'The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.' Nonetheless, after the adoption of the Federal Rules, attempts were made indirectly to undercut that right by having federal courts in which cases involving both legal and equitable claims were filed decide the equitable claim first. The result of this procedure in those cases in which it was followed was that any issue common to both the legal and equitable claims was finally determined by the court and the party seeking trial by jury on the legal claim was deprived of that right as to these common issues. This procedure finally came before us in *Beacon Theatres, Inc. v. Westover*, . . ." *Id.* at 472.

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considered "incidental."²² We therefore conclude that the right to a jury trial of a claim for damages under the Civil Rights Act of 1968 may not be denied on the ground that such damages are merely incidental to the prayer for injunctive relief.²³

V.

Since the district court relied on several cases²⁴ holding

²² "Since the decision of the Supreme Court in *Beacon Theatres, Inc. v. Westover*, and *Dairy Queen, Inc. v. Wood*, it is clear that there is a right to a jury trial on an issue of damages, whether they are pleaded independently, or as an incident to a request for an injunction." 5 Moore's Federal Practice ¶ 38.24[1] at p. 1904. See also ¶ 39.19[2] at p. 1721.

There is an equitable remedy of restitution which would not, of course, be eliminated by these decisions. In *Porter v. Warner Holding Co.*, 323 U.S. 395, the Court recognized that in the government's suit for an injunction to enforce the Emergency Price Control Act of 1942, the government might recover overcharges as restitution. The Court thought the equitable remedy of restitution appropriate—even though not specified in the statute—because it was incidental to other equitable relief and because its use would be appropriate to the enforcement of the statute. But these were justifications for the awarding of relief concededly equitable. The statute also permitted a private suit for damages and a government suit for damages (in the nature of penalties as the Court described them); in either case the damages might be trebled. The Court noted that restitution "differs greatly from the damages and penalties which may be awarded." *Id.* at 402. These remedies were expressly identified as legal in nature, and hence a jury trial would have been required.

²³ It seems quite clear that the punitive damages in this case cannot be considered "incidental" to equitable relief. See note 44, *infra*. See also *Porter v. Warner Holding Co.*, 323 U.S. 395, in which the Supreme Court viewed the government's right to sue for damages under the Emergency Price Control Act of 1942 as an action at law for "penalties." *Id.* at 401-402. See also *United States v. Jepson*, 90 F. Supp. 963 (D.N.J. 1950). But cf. *United States v. Shaughnessy*, 86 F. Supp. 175 (D. Mass. 1949). The Shaughnessy court held that the government could recover statutory penalties along with an injunction under the Housing and Rent Act of 1947. One basis for the decision, that the damages could be considered "incidental" to equitable relief, is now obsolete in view of *Beacon* and *Dairy Queen*. The other basis was that the "damages sought are in the nature of a penalty when sued for by the United States, and this right to sue exists only where the tenant himself has failed to bring his action. It is essentially what would be an old action in equity and as such, is triable before a court without a jury." *Ibid.* Professor Moore is critical of this decision. 5 Moore's Federal Practice ¶ 38.37[1] at 307. The court failed to mention either the Supreme Court's decision in *Porter* or the general proposition that equity will not avoid damages penal in character. To the extent that it may have viewed the suit as one in equity because the government stood in the shoes of the individual tenant, *Ross v. Bernhard*, 396 U.S. 531 (discussed in the text, *supra*), has clearly eliminated that basis for denying a jury trial.

²⁴ See note 8, *supra*. See also *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969); *Harkless v. Sweeny Independent*

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that in an employee's suit for reinstatement and back pay under Title VII of the Civil Rights Act of 1964, the employer is not entitled to a jury trial, we should briefly indicate why we think the reasoning of those cases is inapplicable here.

First, insofar as the cases hold that back pay is a legal remedy which may be recovered as incidental to equitable relief, we believe they cannot stand in the face of *Beacon* and *Dairy Queen*.

Second, to the extent that they hold, relying on *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49, that a jury trial is not required because the right vindicated is a statutory right, we reject the conclusion because it fails to differentiate between a statutory proceeding and the enforcement of a statutory right in an ordinary "civil action" in the courts.

Third, an acceptable rationale for awarding back pay in a non-jury judicial proceeding is consistent with our analysis of the damage claims asserted in this case. It is not unreasonable to regard an award of back pay as an appropriate exercise of a chancellor's power to require restitution.³⁴ Restitution is clearly an equitable remedy. As Professor Moore put it:

"In equity, restitution is usually thought of as a remedy by which defendant is made to disgorge ill-gotten gains or to restore the status quo, or to accomplish both objectives."³⁵

The retention of "wages" which would have been paid but for the statutory violation (of improper discharge) might well be considered "ill-gotten gains"; ultimate pay-

³⁴ (Continued)

School District, 427 F.2d 319, 324 (5th Cir. 1970), cert. denied, 400 U.S. 991 (no jury trial for back pay claim under 42 U.S.C. § 1983); *Culpepper v. Reynolds Metals Co.*, 296 F.Supp. 1232, 1239-1243 (N.D. Ga. 1968), reversed on other grounds, 421 F.2d 888 (5th Cir. 1970). Cf. *Ochoa v. American Oil Co.*, 338 F.Supp. 914 (S.D. Tex. 1972) (court writes in depth opinion contrary to these prevailing cases but follows circuit precedent in denying jury trial).

³⁵ This reasoning is applicable to 42 U.S.C. § 1983 as well since that statute authorizes not only "an action at law" but also a "suit in equity."

³⁶ 5 Moore's Federal Practice ¶ 38.24[2] at p. 1905.

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ment restores the situation to that which would have existed had the statute not been violated.²²

The payment of compensatory damages in a housing discrimination case, however, is not a return to plaintiff of something which defendant illegally obtained or retained; it is a payment in money for those losses—tangible and intangible—which plaintiff has suffered by reason of a breach of duty by defendant. Such damages, as opposed to rent overcharges,²³ unpaid overtime wages,²⁴ or back pay, cannot properly be termed restitution.²⁵

²² Similarly, rent overcharges might be termed "ill-gotten gains." *Porter v. Warner Holding Co.*, 328 U.S. 395, discussed in note 32, *supra*. Attempts have been made to distinguish private actions and actions intended to correct an offense against the public interest, with the conclusion that a jury trial need not be afforded in the latter situation. In addition to the analytic difficulty with this public-private distinction, see Note, *The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964*, 37 U. Chi. L. Rev. 167, 175-176, we fail to see how this makes any difference in the application of the Seventh Amendment. Whether a purely private wrong or a wrong somehow associated with the public interest is to be vindicated, if Congress chooses to permit its vindication by a "civil action" in the courts, it must respect the commands of the Seventh Amendment. Suits to collect statutory penalties—clearly suits brought to redress offenses against the public interest—have long been considered suits to collect a debt which are triable to a jury. See *Hepner v. United States*, 213 U.S. 103, and cases there cited. See also *Fleitmann v. Welsbach Co.*, 240 U.S. 27, 29; *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510. This "public interest" concept might appropriately be used as a persuasive justification for the use of the equitable remedy of restitution. See *Porter v. Warner Holding Co.*, 328 U.S. at 402. The court in *Wirtz v. Jones*, 340 F.2d 901, 905 (5th Cir. 1965) referred to the fact that the suit was "to redress a wrong done to the public good" when it denied a jury trial in a suit by the government to enjoin violation of the Fair Labor Standards Act and to compel payment of withheld wages. However, the opinion makes it clear, citing as it does the *Porter* case, that the court was speaking of the equitable power to order restitution. If the remedy cannot fairly be characterized as restitution, however, the fact that the recovery sought is to redress a wrong done to the public good should not affect the right to a jury trial.

²³ *Porter v. Warner Holding Co.*, 328 U.S. 395. See note 32, *supra*.

²⁴ *Wirtz v. Jones*, 340 F.2d 901 (5th Cir. 1965). See note 37, *supra*. If, however, an employee rather than the government sues for back wages and liquidated damages under the Fair Labor Standards Act, the action is triable to a jury. See cases cited in *Wirtz* at p. 904. The employee's action is generally viewed as analogous to a common law action of debt or assumpstai. The liquidated damages available to an individual plaintiff would not be recoverable in equity as restitution. In any event, the same recovery available as restitution in equity might also be available in the common law action for general assumpstai. See 5 *Moore's Federal Practice* ¶ 38.24[2] at p. 1905.

²⁵ One commentator's observation in the Title VII situation might apply equally well to other instances of restitution:

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Whether or not the jury trial issue was correctly resolved in the back pay cases arising under the 1964 Act,⁴¹ we are satisfied that they are not applicable to the question presented to us under the 1968 statute.

VI.

As the district court correctly emphasized, there are persuasive reasons for interpreting § 812 to authorize "the court" but not a jury to award damages to an injured party. When those words are used in connection with the allowance of fees, they clearly describe the judge rather than the jury.⁴² Therefore, it is argued that the same words in the clause providing that the "court" may award damages must also refer to the trial judge rather than the jury.

The argument is persuasive but not compelling. The "award" may refer to the entry of judgment by the court just as the amount which a plaintiff may "recover" in antitrust litigation is finally determined by the court's judgment rather than the verdict of a jury, which is unmentioned in the Clayton Act but is undeniably required if demanded by either party.

Other language in the statute implies, without expressly stating, that a jury's participation is appropriate. The statutory reference to "damages" and also to "punitive damages" would normally contemplate a jury verdict as an element of the judicial process leading up to the final

⁴⁰ (Continued)

"However, it is important to note that the highly subjective questions of damages, which are often felt to be particularly appropriate for jury determination, are not present in Title VII cases. Back pay awards usually involve a definite amount for a definite period of time, and the total amount in controversy often can be stipulated by the parties. Most problems in determining the amount of a back pay award would be ones of computation rather than subjective evaluation." Comment, *The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964*, 37 U. Chi. L. Rev. 167, 173 (1969).

⁴¹ We note the conflicting views expressed by Judge Noel in *Ochon v. American Oil Co.*, 338 F.Supp. 914 (S.D. Tex. 1972), but we, of course, express no opinion on the issue since it is not before us.

⁴² The proviso to subparagraph (c) states that the prevailing plaintiff shall be awarded fees if "said plaintiff in the opinion of the court is not financially able to assume said attorneys' fees." 42 U.S.C. § 3612(c).

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award.⁴³ Certainly it is highly unusual for a federal statute to authorize a court to impose punishment, even if limited to \$1,000, without according the defendant the right to a jury trial.⁴⁴

The term "civil action" in legislation enacted since the merger of law and equity in 1938 is comparable to the words "action at law" or "suit in equity" which were used previously.⁴⁵ The words "action at law" implied a right to jury trial. The words "civil action," as *Beacon*, *Dairy Queen* and *Ross* make clear, do not in any sense imply that there is no right to a jury trial—a "civil action" asserting a legal claim is triable to a jury.

The legislative history of the 1968 act is silent on the question. There is no evidence that the proponents of the legislation expressed fear that the right to a jury trial would undermine the statute's effectiveness, or conversely, that opponents accepted any compromise in reliance on an assurance that juries could be demanded. The policy considerations which prompted the legislation probably favor a denial of the right; on the other hand, the more basic constitutional considerations which surround the

⁴³ Title VII of the Civil Rights Act of 1964, see 42 U.S.C. § 2000e-5(g), provides for back pay but not for "damages" or "punitive damages."

⁴⁴ A court of equity would not enforce a penalty or forfeiture absent a specific statutory authorization. See *Livingston v. Woodworth*, 56 U.S. (15 How.) 546, 559-560; *Stevens v. Gladding*, 58 U.S. (17 How.) 447, 453-454. (Except in admiralty, forfeiture cases are triable to a jury. *C. J. Hendry Co. v. Moore*, 318 U.S. 133, 153; 5 Moore's Federal Practice ¶ 38.12[7], subdivision 1 at p. 135.) Cf. *Decorative Stone Co. v. Building Trades Council of Westchester County*, 23 F.2d 426 (2d Cir. 1928), cert. denied, 277 U.S. 594. Furthermore, it appears that the few cases which have held that a court may decide if punitive damages shall be awarded have all been patent cases in which a jury trial was available on the issues of infringement and actual damages and the court merely decided, pursuant to unequivocal statutory language, whether the damages should be increased (up to a maximum of three times the actual damages). See *Seymour v. McCormick*, 57 U.S. 480, 488-489; *Swofford v. B. & W., Inc.*, 336 F.2d 406 (5th Cir. 1964), cert. denied, 379 U.S. 962; *Kennedy v. Lasko Co.*, 414 F.2d 1249 (3rd Cir. 1969). Those cases indicate that the jury shall determine the issue of actual damages; the latter two cases find that *Beacon* and *Dairy Queen* compel a jury trial on the actual damage question. It is one thing to permit a judge to increase the damage award after a jury trial in which a statutory violation has been found and actual damages awarded (the trial judge's right to set the amount of a fine in a criminal case after a jury trial on the factual issues is somewhat analogous); it is quite another thing to permit the imposition of punishment when there is no jury trial as an element of the judicial process leading up to that result.

⁴⁵ See 42 U.S.C. § 1983.

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right to a jury as a protection against the over-zealous judge, point the other way. Nor, if the right to have a jury represent a fair cross section of the community and the desirability of broadening lay participation in judicial implementation of civil rights are kept in mind, can one assert that policy considerations unequivocally favor one view rather than the other.

In the end, we look to another canon of construction as controlling in this case. As Mr. Justice Holmes stated in *United States v. Jin Fuey Moy*: "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." 241 U.S. 394, 401. See also *United States v. Campos-Serrano*, 404 U.S. 293.⁴⁶

Even if our discussion of the Seventh Amendment is deemed inadequate to overcome an unambiguous statutory denial of a jury trial in an action to recover compensatory and punitive damages, there are certainly enough "grave doubts upon that score" that we should place an interpretation on the statute which will avoid the constitutional issue. We therefore hold that it was error for the district court to refuse defendants' request for a jury trial.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

A true Copy:

REVERSED AND REMANDED.

Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

⁴⁶ And see *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 448-449.
 "If, indeed, the construction contended for at the bar were to be given to the act of Congress, we entertain the most serious doubts, whether it would not be unconstitutional. No Court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution. . . ."

Judgment of Court of Appeals

~~September 29, 1970~~

September 29, 1972

Before:

HON. LUTHER M. SWYGERT, *Chief Judge*

HON. JOHN PAUL STEVENS, *Circuit Judge*

HON. WILLIAM J. CAMPBELL, *Senior District Judge*

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Wisconsin and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and this cause be and the same is hereby REMANDED to the said District Court for further proceedings, in accordance with the opinion of this Court filed this day.



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IN THE

MICHAEL ROBAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1035

JULIA ROGERS,

Petitioner,

v.

LEROY LOETHER and MARIANE LOETHER, his wife,
and Mrs. ANTHONY PEREZ

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1972
No. 72-1035

JULIA ROGERS,

Petitioner;

v.

LEROY LOETHER and MARIANE LOETHER, his wife,
and MRS. ANTHONY PEREZ

**REPLY BRIEF IN SUPPORT OF PETITION
FOR A WRIT OF CERTIORARI**

The "Question Presented" by the petition for a writ of certiorari is whether a jury trial is required in actions for injunctive relief and punitive damages under the fair housing law. Respondents' memorandum opposing certiorari contends the question is incomplete because it fails to include actual damages. The issue raised by respondents is hardly responsive to the central issues in this case. Nevertheless, we submit the question of actual damages is "fairly comprised" by the question presented within the meaning of Rule 23(1)(c) of this Court.

The presentation of the actual damage issue in the district court should be restated in the interest of clarity:

(1) The complaint requested injunctive relief and punitive, but not actual, damages. As respondents note, the complaint did in standard fashion request "that the Court grant whatever other and further relief it may deem just

and proper." However, in light of Rule 9(g) of the Federal Rules of Civil Procedure which requires a specific statement of special damages, it is doubtful that such boiler plate language by itself adequately pleads a claim for actual damages.

(2) Petitioner discussed actual damages in pretrial proceedings, and in a pretrial order on February 10, 1970 the district court ruled that the question of actual damages should be tried.

(3) When the district court denied respondents' demand for a jury trial on May 19, 1970, it did so on the assumption that a claim for actual damages was as much a part of the case as a claim for punitive damages.

(4) Respondents elected not to petition the court of appeals for a writ of mandamus to require a jury trial, although mandamus is clearly available to correct an improper denial of a jury demand. *Beacon Theatres v. Westover*, 359 U.S. 500, 511. Instead, respondents chose to proceed through a trial to a final judgment.

(5) The district court entered pretrial orders, on May 7 and July 6, 1970, requiring petitioner to file an itemized statement of special or actual damages, but no statement was filed.

(6) On the first day of the trial, the parties met with the district judge in chambers. Respondents raised the question of petitioner's failure to file an itemized statement of actual damages. The district court stated, and respondents concurred, that the case had "narrowed down to punitive damages."¹ The court indicated that when the trial commenced either side could object to testimony and offers of proof could be made for the record if the

¹ Trial transcript, October 26, 1970, p. 5.

court sustained any objections.² As soon as petitioner sought to testify about an item of actual damages, respondents objected and the district court sustained the objection.³ The court allowed an offer of proof in question and answer form pursuant to Rule 43 of the Federal Rules of Civil Procedure, and petitioner proceeded on that basis.⁴ The effect of the court's ruling was to exclude testimony of actual damages from the district court's consideration but to allow petitioner to develop a record for use on appeal. Petitioner did not appeal the exclusion of evidence of actual damages.

(7) At the conclusion of the trial, the district court awarded punitive but not actual damages.

Petitioner framed the "Question Presented" in accordance with the court of appeals' view that the right to a jury trial should be determined by the relief requested in the complaint (25a). Specific reference to actual damages was also omitted because the final judgment of the district court from which respondents appealed was limited to punitive damages. Nevertheless, to the extent that actual damages may or ought to be considered in resolving the issue here presented, the actual damage issue is "fairly comprised" within the question presented. The language of the statute furnishes no basis for distinguishing actual and punitive damages for the purpose of determining whether there is a right to trial by jury. Section 812(c) provides "the court . . . may award to the plaintiff actual damages and not more than \$1000 punitive damages . . ." Under the statute, if a jury is required for the award of one type of damages it would seem to be required for both. Similarly, if a jury is not required for an award

² *Id.*, at 7.

³ *Id.*, at 17-18.

⁴ *Id.*, at 18.

of one kind of damages, then it would seem not to be required for either. Additionally, the threshold constitutional problem is the same whether actual or punitive damages are sought: is an action to enforce Title VIII in the nature of a suit at common law? Petitioner's argument that the right to fair housing is unrelated to the common law applies whether the remedy to a denial of the right involves actual or punitive damages, or both.

In one short section of the petition we focus on special considerations concerning the award of punitive damages, but in the main the petition discusses damages generally. This is because the Seventh Circuit did not limit itself to requiring juries for any particular kind of damages, but rather broadly asserted that juries are mandated both in actions for compensatory and punitive damages.

Respectfully submitted,

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SUPREME COURT, U. S.

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No. 72-1035

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

JULIA ROGERS, PETITIONER

v.

LERoy LOETHER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS
AMICUS CURIAE

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***ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT***

**MEMORANDUM FOR THE UNITED STATES AS
AMICUS CURIAE**

This memorandum is submitted in response to this Court's order of March 19, 1973, inviting the Solicitor General to express the views of the United States with respect to the pending petition for certiorari. We conclude that the petition should be granted because of the importance of the issue presented to the proper administration of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. 3601-3619 (hereinafter the "Fair Housing Act"), and because the decision below is erroneous.

I. The question presented here is whether a suit brought by an aggrieved individual pursuant to Section 812 of the Fair Housing Act, 42 U.S.C. 3612, for

injunctive relief,¹ damages, and attorneys' fees, is properly triable to the court sitting without a jury. While Section 813 of the Act authorizes suits by the Attorney General to enjoin discriminatory housing practices, "complaints by private persons are the primary method of obtaining compliance with the Act." *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205, 209. Cf. *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402. But even in the most favorable circumstances private litigation may encounter substantial difficulties. The prospective tenant who has been turned away on account of race often has an immediate need for housing that may have to be satisfied elsewhere unless

¹ Petitioner originally sought injunctive relief and damages (Pet. App. 13a-14a). After the court issued a preliminary injunction restraining rental of the apartment, however, petitioner secured alternative housing and disclaimed any further need for injunctive relief (Pet. App. 1a, 14a). Accordingly, at the time the district court considered defendant's request for a jury trial, only the issues of damages and attorneys' fees remained.

The courts below, however, viewed respondents' request for a jury trial on the basis of the prayer for relief which, as in most fair housing cases, had sought both injunctive and monetary relief. The court of appeals stated in its opinion that (Pet. App. 25a):

[W]e share the district court's view that the right to a jury trial in this kind of case may properly be tested by the character of the relief requested in plaintiff's complaint. Our decision is not predicated on the special circumstance that only the damage claims remained when defendant's demand for a jury was denied.

We believe this Court should approach the case the same way. (If the decision of the court of appeals had been predicated on the abandonment of the claim for injunctive relief, the situation might be regarded as so atypical that review would not be appropriate—especially in light of the propriety of awarding some form of injunctive relief, if requested, as well as damages, to a complainant in petitioner's circumstances.)

prompt relief is available. The victim of discrimination may therefore have little sustained incentive to prosecute a lawsuit fully, especially since fair housing litigation generally is not financially rewarding to plaintiffs or their attorneys. Thus, as this type of litigation becomes more complex, lengthy and costly, the effectiveness of private enforcement of the Fair Housing Act diminishes.

Yet if the decision below is permitted to stand, private litigants seeking to enforce their rights under the Fair Housing Act will be confronted with the complications and uncertainties that inhere in a jury trial. Proceedings will become more complex and expensive and will take longer than equity actions tried to the courts alone. And this in turn will impair the "important role" that private litigation plays in vindicating the rights guaranteed by the Fair Housing Act. *Trafficante v. Metropolitan Life Insurance Company, supra*, 409 U.S. at 211.

While this is the first case in which the jury trial issue has been decided by a court of appeals, several district courts have considered the question and have reached conflicting results.² Also, in *United States v. Reddoch*, 467 F. 2d 897 (C.A. 5), the court held that no jury trial is available in "pattern or practice" cases brought by the Attorney General pursuant to Section 813 and relied in part on the district court decision in the present case. The courts of appeals have also held, in decisions criticized by the court below (Pet. App.

² The district courts in the present case and in *Cauley v. Smith*, 347 F. Supp. 114 (E.D. Va.), held that no jury trial is available. The courts in *Kastner v. Brackett*, 326 F. Supp. 1151 (D. Nev.), and *Kelly v. Armbrust*, 351 F. Supp. 869 (D. N.D.), reached the opposite result.

28a), that no jury trial is available³ under the equal employment opportunity laws in Title VII of the Civil Rights Act of 1964.⁴ Review by this Court is therefore appropriate here in order to avoid uncertainty and to ensure the effectiveness of the private remedy established by Congress in the Fair Housing Act.

2. In part, the court of appeals rested its decision on the language of Section 812(c) (Pet. App. 31a-33a). In our view, however, there is no basis for concluding that Congress contemplated the use of juries in private actions under the Act. To the contrary, Section 812(c) speaks exclusively in terms applicable to a trial before a judge sitting without a jury.

Thus, Section 812(c) provides:

The *court* may grant as relief, as it deems appropriate, any permanent or *temporary injunction*, *temporary restraining order*, or other order, and may award to the plaintiff actual damages and not more than \$1,000 punitive damages, together with *court costs* and *reasonable attorney fees* in the case of a prevailing plaintiff: *Provided*, That the said plaintiff in the opinion of the *court* is not financially able to assume said *attorney's fees*. [Emphasis added.]

The italicized words above either explicitly refer to a judge, rather than a jury, or deal with matters that

³ *Johnson v. Georgia Highway Express, Inc.*, 417 F. 2d 1122, 1125 (C.A. 5); *Harkless v. Sweeny Independent School District*, 427 F. 2d 319, 324 (C.A. 5), certiorari denied, 400 U.S. 991; *McFerren v. County Board of Education*, 455 F. 2d 199 (C.A. 6); *Smith v. Hampton Training School*, 360 F. 2d 577 (C.A. 4). See also *Hayes v. Seaboard Coast Line Railroad Co.*, 46 F.R.D. 49 (S.D. Ga.).

⁴ 42 U.S.C. 2000e *et seq.*; 42 U.S.C. 1983.

are uniformly confided solely to judges. The words "the court" at the beginning of the sentence are the only possible subject of the phrase "may award to the plaintiff actual damages and not more than \$1,000 punitive damages." There is no mention of "verdict," which only a jury can issue. Moreover, Section 812(c) is specifically designed to give the district judge discretion to decide among the available alternative forms of relief—"the court may grant as relief, as it deems appropriate."

In light of all this, it is apparent that Congress intended that private enforcement of the Fair Housing Act would be conducted in suits tried by the court sitting without a jury. Indeed, the court below conceded that the argument that Section 812 does not contemplate jury trials is "persuasive but not compelling" (Pet. App. 31a).⁵

3. Relying on *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, the court of appeals based its construction of Section 812(c) to require jury trials on the doctrine that statutes should be so construed as to avoid grave constitutional problems (Pet. App. 33a). We believe,

⁵ The court of appeals suggested that the use of the phrase "punitive damages" itself implies that a jury is appropriate. However, this divorces the phrase from its context, since the provision is addressed to the court's discretion and carries a statutory limit of \$1,000. Moreover, in employment discrimination cases, courts have awarded back pay totaling hundreds of thousands of dollars in non-jury trials. See, e.g., *Robinson v. Lorillard Corporation*, 444 F. 2d 791 (C.A. 4) (award of back pay granted for period of many years). See, also, *United States v. Virginia Electric and Power Co.*, C.A. No. 638-70-R (E.D. Va. 1971) (consent order) (back pay of approximately \$250,000). There is nothing in the nature of punitive damages as a form of relief that implies the use of a jury.

however, that the court exaggerated the constitutional difficulty of permitting disposition of this issue by a judge alone.

In *Katchen v. Landy*, 382 U.S. 323, a case not cited by the court below, this Court held that a claimant in bankruptcy who was charged with having committed a voidable preference was not entitled to a jury trial. This Court reaffirmed its prior holdings that "equity courts have the power to decree complete relief and for that purpose may accord what would otherwise be legal remedies." 382 U.S. at 338. With respect to the contention that *Dairy Queen* and *Beacon Theatres* required a contrary result, this Court stated that the rule of those cases "is itself an equitable doctrine," adding that (382 U.S. at 339):

In neither *Beacon Theatres* nor *Dairy Queen* was there involved a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury.

Katchen v. Landy means, at least, that Congress has constitutional authority to confide to a court of equity, sitting without a jury, the authority to grant monetary as well injunctive relief for violations of rights created by statute. Thus, under the Seventh Amendment, the mere possibility of monetary recovery does not automatically require that a jury trial be available.⁶

As in *Katchen*, Section 812(c) is part of a "statutory scheme contemplating the prompt trial of a disputed

⁶ Even before this Court's decision in *Katchen*, a court of appeals had expressly rejected the contention that *Dairy Queen* converted all claims for money damages into legal rather than equitable claims. *Swofford v. B & W, Inc.*, 336 F. 2d 406, 414 (C.A. 5).

claim without the intervention of a jury" (382 U.S. at 339), and should be analyzed accordingly. Section 814 of the Act, 42 U.S.C. 3614, expressly requires expedition of proceedings in cases brought by private parties under Section 812. Particularly in light of the prime importance of private suits in securing compliance with the Act, and the deleterious effect that the complications and uncertainties inherent in jury trials would have on the prosecution of these cases by litigants and their attorneys (see pp. 2-3, *supra*), we believe that a division of fair housing cases into "equitable" portions to be tried by the court alone and "legal" segments to be allocated to a jury would frustrate the efficient administration of the Act, and of its provisions for expedition.⁷

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should grant the petition for a writ of

⁷ In *Hayes v. Seaboard Coast Line Railroad Co.*, 46 F.R.D. 49, 52-53 (S.D. Ga.), the court, in denying a jury trial on an analogous claim for back pay, analyzed the practical problems as follows:

Defendant maintained on oral argument that the proper procedure in this case would be to try the back pay or money judgment phase before a jury and then for the Court to proceed to decide whether racial discrimination exists in employment practices and whether defendant should be enjoined. To give such direction to Title VII cases would, in my view, thwart the will of Congress and to an extent frustrate the purposes of the legislation. Further and alternatively, it is hard to conceive of a more chaotic method of district court handling of an EEO case than for the judge to hold a non-jury trial, as he must, on the racial discrimination charges under the injunctive and declaratory relief features and thereafter refer to a jury the issue of back pay after a repetition of the same evidence.

certiorari and should reverse the judgment of the court
of appeals.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1973

No. 72-1035

JULIA ROGERS, *Petitioner*,

v.

LEROY LOETHER, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals
for the Seventh Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL COMMITTEE
AGAINST DISCRIMINATION IN HOUSING.
WASHINGTON, D.C.

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**BRIEF AMICUS CURIAE OF THE NATIONAL COMMITTEE
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INTEREST OF THE AMICUS

This Brief is filed with the written consent of the parties hereto, pursuant to Rule 42(2), Supreme Court Rules.

NCDH was founded in 1950 to establish and implement a program to eliminate racial segregation and discrimination in housing. Since then, NCDH has lodged numerous challenges to discriminatory housing practices and exclusionary land use controls, and has been actively engaged in educational projects designed to

insure nondiscriminatory access of minorities and the poor to equal opportunity in housing. In its continuing effort to eradicate racial discrimination and to achieve housing dispersal on a non-segregated basis, this Brief is submitted in the belief that Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619 (hereinafter the "Fair Housing Act"), can be properly administered and enforced only by preserving to private citizens, seeking to vindicate their right to freedom from discrimination in the purchase and lease of real property, the most expeditious and inexpensive legal redress. To encumber unduly the assertion of these federally protected rights by the complicated and expensive procedures inherent in a jury trial would only serve to dilute the effectiveness of the Statute, discourage aggrieved citizens from seeking enforcement, and frustrate the intent of Congress.

OPINIONS BELOW

1. Opinion of the District Court denying demand for jury trial was entered on May 19, 1970; reported at 312 F.Supp. 1008.
2. District Court's unreported findings of fact and conclusions of law, entered October 27, 1970.¹
3. Opinion of the Court of Appeals entered on September 29, 1972; reported at 467 F.2d 1110.

JURISDICTION

Judgment of the Court of Appeals was entered September 29, 1972. Petition for writ of certiorari was filed January 26, 1973, and granted June 11, 1973. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

¹ Appendix to Petition for Writ of Certiorari, pp. 7a-12a.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. United States Constitution, Amendment VII.
2. United States Constitution, Amendment XIII.
3. The Civil Rights Act of 1968, §§ 801-819 (Title 42 U.S.C. §§ 3601-3619).

QUESTIONS PRESENTED

1. Whether an action for injunctive relief and damages, either actual or punitive, brought under a statutorily created cause of action under the Fair Housing Act by a private citizen to enforce her right to freedom from discrimination on the basis of race in the rental of real property is an action in which Defendant is entitled to a trial by jury?
2. Whether the District Court erred in denying the defendants' demand for jury trial, in an action brought pursuant to a statutorily created cause of action under the Fair Housing Act for punitive damages and injunctive relief against discrimination on the basis of race in the rental of an apartment, where the only issues remaining for determination were those of punitive and compensatory damages—the injunction having been dissolved prior thereto by the consent of the Plaintiff?

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

This case was filed in the United States District Court for the Eastern District of Wisconsin seeking relief under the Civil Rights Act of 1968, Title VIII, (42 U.S.C. §§ 3601-3619), which prohibits discrimination in the sale or rental of housing on the basis of race, color, religion or national origin. The District Court's jurisdiction was based on 42 U.S.C. § 3612(a).

On October 30, 1969, Jacqueline Haessly responded on behalf of her friend, Petitioner Julia Rogers, who was hospitalized, to an advertisement in the Milwaukee Journal for the rental of an apartment. After a brief interview with Mrs. Perez, the cousin of the landlords, Leroy and Mariane Loether, their apparent agent, and following a phone conversation between Mrs. Perez and Mrs. Loether, Mrs. Perez was authorized to accept a deposit on the apartment from Miss Haessly on Mrs. Rogers' behalf. During that conversation, Mrs. Loether also elicited information regarding the applicant's financial status, marital status, and family size. Upon Mrs. Loether's request, Miss Haessly gave her the number of the hospital room in which Mrs. Rogers was confined to allow her to discuss the rental directly with the Petitioner.²

Mrs. Loether called Mrs. Rogers at the hospital and discussed the rental of the apartment, at which time Mrs. Rogers informed Mrs. Loether that she was black. Upon the disclosure of Petitioner's race, Defendants revoked the apartment rental.³

Petitioner filed her complaint in the District Court on November 11, 1969, for injunctive relief and punitive damages against Leroy and Mariane Loether and Mrs. Anthony Perez for refusal to rent her an apartment because of her race in violation of the Fair Housing Act.

The District Court granted Petitioner's motion for temporary restraining order on November 17, 1969, and after an evidentiary hearing on November

² District Court's oral Findings of Fact and Conclusions of Law. Appendix to Petition for Writ of Certiorari, pp. 8a-9a.

³ *Id.* at pp. 9a-10a.

20, 1969, entered a preliminary injunction restraining the rental of the apartment pending final determination by the Court.⁴

Defendants answered and demanded a trial by jury.

Petitioner, after the issuance of the preliminary injunction and before the Court's ruling on the Defendants' jury demand, found a place to live. The Court thereupon on April 30, 1970 dissolved the preliminary injunction with the consent of the Petitioner.⁵

Petitioner, at pre-trial hearing, indicated an interest in compensatory damages, and the Court viewing her claim as inclusive of both compensatory and punitive damages entered a pre-trial order requiring her to submit an itemized statement of her special damages. (Petition for Writ of Certiorari, p. 7).

The Court, subsequent thereto, denied the Defendants' demand for jury trial, leaving pending before it for trial only the issues of punitive and compensatory damages, and attorney's fees.

The District Court in its opinion and order of May 19, 1970 denying demand for jury trial found that

"this cause of action is a statutory one invoking the equity powers of the court, by which the court may award compensatory and punitive money damages as an integral part of the final decree so that complete relief may be had. The action is not one in the nature of a suit at common law, and

⁴ *Id.* at p. 7a.

⁵ *Ibid.*

therefore there is no right to trial by jury on the issue of money damages in the case." *Rogers v. Loether*, 312 F.Supp. 1008, 1009.

The Court further held that

"An action under Title VIII is not an action at common law. The statute does not expressly provide for trial by jury of any issues in the action." (312 F. Supp. at 1010)

At trial the Court found that Plaintiff had suffered no actual damages * but assessed punitive damages of \$250.00. The request for attorney's fees was denied.

Defendants appealed the decision of the District Court to the Seventh Circuit Court of Appeals alleging error in the Court's finding of discrimination, the award of punitive damages, and denial of jury demand.

The Court of Appeals found no error in the award of punitive damages and finding of discrimination, *Rogers v. Loether*, 467 F.2d 1110, 1112, but reversed and remanded on the issue of denial of jury trial.

The Court of Appeals held:

"(1) the constitutional right to trial by jury applies in at least some judicial proceedings to enforce rights created by statute; (2) this action for damages is "in the nature of a suit at common law"; . . . (3) the nature of the claim is "legal" . . . (4) the right to a jury trial may not be denied on the ground that the damage claim is incidental to a claim for equitable relief . . ." 467 F.2d at 1112-1113.

*Petitioner having failed to file, as ordered by the Court at pre-trial hearings, a statement of special damages, the court sustained defendants' objection to testimony concerning actual damages. (Trial transcript, October 26, 1970, p. 5).

SUMMARY OF THE ARGUMENT

The Seventh Amendment to the United States Constitution provides that in "(s)uits at common law, where the value in controversy exceeds twenty dollars, the right to trial by jury shall be preserved."

It is the position of the Amicus that the constitutional guarantee to jury trial is not applicable to, and in the interest of justice should not be extended to, an action brought under Section 812 of the Fair Housing Act by a private person, seeking to vindicate the rights declared by that statute.

The nature of the action created under Section 812 of the Act is an equitable one for which there is no adequate remedy at law and for which no analogous counterpart existed at common law at the time of the adoption of the Seventh Amendment.

The action, as created by statute, is not one for money damages *per se* based on a traditional legal claim. There is, in fact, no amount in controversy—nor is there a claim akin to any action triable by jury for which money damages may be had. The primary thrust of the statute is remedial—the enforcement of the general public interest in insuring continuing compliance with the national policy declared by Congress "to provide, within constitutional limits, for fair housing throughout the United States."

The Act provides two conditions under which an aggrieved party may bring a civil action:

(1) Under Section 810, the Secretary of Housing and Urban Development is charged with the duty of enforcement through an administrative procedure whereby the aggrieved party files a complaint and the

Secretary takes appropriate measures to effectuate compliance. If the Secretary is unable to obtain voluntary compliance, the aggrieved person may commence a civil action in the appropriate U. S. District Court under the conditions set forth in Section 810(d).

(2) Similarly, a civil action under Section 812 may be brought by the aggrieved private person for enforcement of rights guaranteed under the Act:

"The Court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than \$1000 punitive damages . . ."

A civil action brought under either Section 810 or 812 is subject to continuance by the Court from time to time before bringing it to trial "if the Court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in a satisfactory settlement of the discriminatory housing practice complained of in the complaint."

The language of the Act (Section 812(a)) is framed in discretionary terms respecting the duty of the Court to first conciliate the matter before proceeding to trial.

Thus, though the statute creates a new cause of action, Congress has specifically embodied its intent that the statutory procedure, as set forth under the Act, is akin more to a proceeding of judicial mediation or conciliation than it is to the traditional form of civil action requiring issues to be adjudicated by a jury. To require a trial by jury under these proceedings, where such a safeguard clearly is not required, would only serve to complicate the proceedings, causing unusual delay and extreme hardship to the parties. Fur-

thermore, it would discourage, as inexpedient, the primary means of enforcement of the Act. *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205, 209.

The award of damages, as contemplated by the Act, is not based on a legal claim cognizable at common law, but instead is framed in language which authorizes the judge, sitting without a jury, to grant whatever relief he deems just and appropriate that will afford complete relief and insure continuing compliance under the circumstances of each case. Moreover, to deny the aggrieved person, seeking enforcement of rights granted under the Act, the expeditious relief required by Section 814 of the Act would thwart the intent of Congress by rendering ineffective the contemplated remedy. Section 814 of the Act provides:

“any court in which a proceeding is instituted under Section 3612 or 3613 of this title shall assign the case for hearing at the earliest practicable date and cause the case to be in every way expedited.”
(42 U.S.C. § 3614)

The majority of the aggrieved persons who seek redress under the provisions of the Act are minority and poor. The lengthy and cumbersome requirement of a jury trial proceeding in the determination of their claims would work an undue hardship on these classes, imposing a heavy burden for which there can be advanced no legitimate purpose. Minority groups who are discriminated against in access to housing have neither the resources nor the luxury of time inherent in a lengthy jury trial proceeding. Their housing need is imminent and urgent, necessitating an expeditious resolution of their claim if the remedy afforded them by statute is to have any real significance. To require

that a claimant wait until his or her claim is determined by a jury, would in most instances result in a discontinuance of the action, or a dilution of its effectiveness due to the immediate need to seek alternate housing accommodations. Discrimination on the basis of race, as in this case, has too long been a scourge to this nation's principles of democracy and freedom. A requirement of any less than the full and effective implementation of Federal statutes designed to obliterate the historical vestiges of slavery from the lives of more than 20 million Americans is to deny equal protection of laws and to impose upon a racial class a burden too long carried. See *Jones v. Mayer Co.*, 392 U.S. 409, at 444-445, 88 S.Ct. 2186, at 2205-2206 (concurring opinion of Mr. Justice Douglas). The mandate of Congress is clear. The Fair Housing Act must be administered and enforced, in accordance with the language of the statute, in an expeditious and efficient manner if the declaration of the national policy of fair housing throughout the nation is to be realized.

ARGUMENT

I. The District Court Did Not Err in Denying Defendants' Demand for Jury Trial in an Action for Injunctive Relief and Damages Under Section 812 of the Fair Housing Act.

The Seventh Amendment right to jury trial is not applicable to, nor should it be extended to, claims arising under the Fair Housing Act, Section 812. The right created under that provision of the Act is a new equitable cause of action.

The award of damages is expressly committed to the discretion of the court—with an overriding condition, consistent with the perceived intent of Congress—that the court take every measure judicially expedient

to insure conciliation of claims without trial, if possible. The Seventh Amendment only preserves a right to jury trial in suits existing at common law at the time the Amendment was adopted. The crux of the issue in this case is whether the claim created under the Fair Housing Act is analogous to a suit at common law to which the defendant is entitled to a trial by jury.

Historically, if a new cause of action was created by statute and the statute was silent on the mode of trial, the court looked to the nearest analogy to decide if there was a right to jury trial. The Court of Appeals, considering the nature of the substantive right asserted here,⁷ concluded that it was analogous to a common law action of a traveler against the innkeeper who refused without justification to rent lodging (467 F.2d at 1117). However, historically the innkeeper's duty to provide lodging to a traveler was not founded on a traveler's right to be free from discrimination, but rather was based upon contract. It was a well established legal principle in common law jurisdictions that the business of an innkeeper was quasi-public in character. The underlying theory governing the relation of the innkeeper and guest was that "The innkeeper holds himself out as able and willing to entertain guests for hire; and in the absence of a specific contract, the law implies that he will furnish such entertainment as the character of his inn and reasonable attention to the convenience and comfort of his guests

⁷See 467 F.2d at 1113-1114, where the court discusses the Seventh Amendment's inapplicability to claims that did not arise under common law, and analyzed the claim asserted herein under the criteria set forth by Mr. Justice Story in *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 7 L.Ed. 732.

will afford." *DeWolf v. Ford*, 193 N.Y. 397, 86 N.E. 527, 530. The action was one to recover damages resulting from the innkeeper's breach of the duty owed to his guest. Damages were recoverable in such cases not merely because defendant was bound to give plaintiff accommodations, but also because of the indignity suffered by *public expulsion*, *Aaron v. Ward*, 203 N.Y. 351, 357, 96 N.E. 736, 738; *Odom v. East Avenue Corporation*, 34 N.Y.S.2d 312.

As thus illuminated, it is apparent that expansion of this common law cause of action to the right of racial minorities to be free from discrimination in housing, or to encompass a modern landlord's duty to refrain from refusal to rent real property on the basis of race, color, religion or national origin, strains the imagination.

The practices of slavery and bondage were widely sanctioned throughout the colonies and the old world.⁸ Thus, it is unreasonable to conclude that there were any actions at common law for the protection of rights against discrimination, racial or otherwise, as contemplated by the Fair Housing Act. The nature of the substantive right granted under the Act is not based on contract, but instead is founded upon the democratic principle that every citizen in the United States has an inherent right to purchase or lease real property without regard to previous condition of servitude, national origin or creed.

⁸ Note Petition for Writ of Certiorari, pp. 16-17, citing *Somerset v. Stewart*, 98 Eng. Rep. 499 (K.B. 1772); *King v. Inhabitants of Thomas Ditton*, 99 Eng. Rep. 891 (1785); and A. Lester & G. Bindman, *Race and Law* 32 (1972).

Further, unlike the action at common law available to a traveler against an innkeeper, the rights declared under the Fair Housing Act are not enforced through an action at law for damages. Instead the action is expressly for injunctive relief—historically a matter of equity jurisdiction and unknown at common law. It is not unintentional that the drafters of the Fair Housing legislation did not more specifically provide for a civil action for money damages alone. Congress realized that civil rights cannot adequately be protected in a damage action. The very nature of the right is such that money damages cannot compensate for the loss suffered. But courts of equity have remedies available which are capable of giving complete relief—equity relief being free from local prejudice often found in juries. It is uncontroverted that there is no right to a trial by jury in an action for injunctive relief. A court in equity has exclusive jurisdiction to fashion relief tailored to protect the right involved in each individual situation and to create a deterrent to the potential wrongdoer before the violation is committed.⁹

That Congress intended the remedy created under the Fair Housing Act to be one of exclusive equitable jurisdiction can be inferred from the language of the Act's enforcement provisions:

"Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur . . . may file a complaint with the Secretary."
(42 U.S.C.A. § 3610(a))

⁹ "Equity's Role in Protection of Civil Rights", 37 Iowa L. Rev. 268 (1952).

Clearly, the relief afforded is not only addressed to wrongful acts already committed, but also to anticipatory acts for which no action at common law was available. Further, Section 3610(d), Title 42 U.S.C. provides:

“If within thirty days after a complaint is filed with the Secretary or . . . the Secretary has been unable to obtain voluntary compliance . . . the person aggrieved may, within thirty days thereafter, commence a civil action in any appropriate United States district court, against the respondent . . . to enforce the rights granted or protected by this subchapter . . . If the court finds that a discriminatory housing practice has occurred or is about to occur, the court may, subject to provisions of § 3612 of this title, enjoin the respondent from engaging in such practice or order such affirmative action as may be appropriate.”

Section 3612(a), Title 42, U.S.C., provides:

“The rights granted by sections 3603, 3604, 3605, and 3606 of this title may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy . . . the court shall continue such civil case brought pursuant to this section or section 3610(d) of this title from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the Secretary or to the local or State agency and which practice forms the basis for the action in court.”

The court in enunciating the proposition that Section 3610 and Section 3612 constitute alternative remedies in the enforcement of the Fair Housing Act, in

Johnson v. Deckler, 333 F.Supp. 88, 89 (N.D. Cal. 1971) commented that "Section 3612 would appear to allow enforcement of rights guaranteed by the Fair Housing Act by suit filed in any district court which meets that section's venue requirement . . . No prerequisite of seeking administrative relief from HUD is imposed. It is expressly provided, however, that the suit may be continued, if the administrative efforts the Court's opinion, are likely to result in satisfactory settlement of the problem." See also *Brown v. LoDuca*, 307 F.Supp. 102, 1969.

Finally, Section 812(c) provides:

"The court *may* grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order or other order, and *may* award to the plaintiff actual damages and not more than \$1,000 punitive damages . . ." (emphasis added) 42 U.S.C. 3612(c).

Clearly, from a reading of the statute as a whole, equity powers of a court to grant injunctive relief to correct a violation which has either occurred or is about to occur, and to order "as the court deems appropriate" complete relief are expressly granted to the court.

There is no action at common law analogous to the relief Congress contemplated granting to an aggrieved party under this Act. A claim arising thereunder does not present issues entitling respondent to a trial by jury.

The Court of Appeals' finding that the nature of the substantive right asserted was analogous to a common law cause of action existing at the time of the adoption of the Seventh Amendment was simply

wrong. Its rationalization that *Dairy Queen v. Wood*, 369 U.S. 469, 82 S.Ct. 894, required the damage issue to be tried to a jury was also wrong. *Dairy Queen* does indeed stand for the proposition that a claim otherwise triable by jury must be so tried, even if it may be deemed incidental to the claim for injunction; a litigant may not be denied Seventh Amendment rights in a claim where legal issues are presented in combination with equitable issues. However, this is not a *Dairy Queen* situation. Under the language of the statute, there is no legal claim, only an equitable one. The award of punitive and compensatory damages is discretionary, affording to the court exclusive equitable jurisdiction to decree complete relief. The damage provisions of the Fair Housing Act do not authorize a claim for a purely money judgment. Compensation to a claimant under the Act is woven into the fabric of a remedial measure for correction of violations of the nation's public policy against discrimination.

The Court further supported its conclusions by relying on *Beacon Theaters Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948. *Beacon Theaters* rests on the proposition that the parties were not excluded from asserting their claims through an adequate remedy at law. In the traditional sense, there is no adequate remedy at law here and thus *Beacon* too is distinguishable from the instant case.

Finally, *Ross v. Bernhard*, 396 U.S. 531, 90 S.Ct. 733 (1970) is considered by the Court of Appeals as controlling in this case. However, *Ross v. Bernhard* was an action brought as a derivative suit. This Court held that "the right to jury trial attaches to those issues in derivative actions as to which the corpora-

tion, if it had been suing in its own right would have been entitled to jury". A derivative stockholder's suit is in the nature of an equitable remedy, allowing the stockholders to enforce a corporate cause of action against the officers, directors, and third parties and to call upon said parties for an accounting. Where the corporation could have properly brought a bill of equity, the action is clearly equitable and no right to jury trial attaches. It is only when the cause of action asserted, no matter what the form of the complaint, could have been brought by the corporation in an action at law that the holding of *Ross v. Bernhard* is applicable for then, legal issues common to issues of an equitable nature, are triable by jury. 396 U.S. 534-536.

Once again, the ultimate question is whether the plaintiff in an action brought under the Fair Housing Act has an adequate remedy at law. Can the claim asserted in equity also be brought in an action at law? Clearly, the answer is no. The claim under the statute is a purely equitable one to which the Seventh Amendment right to trial by jury does not attach.

A long line of cases in the Federal courts support the proposition that "a statute will not be read as having created a right to trial by jury, on a claim for injunction unless Congress has expressly so provided." *Wirtz v. District Council No. 21 Brotherhood of Painters, Decorators and Paperhangers of America*, 211 F.Supp. 253 (E.D. Pa. 1962). In *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 629 (1937), this Court indicated that if Congress creates a statutory proceeding that is not in the nature of a suit at common law, the right to trial by jury is not preserved.

The District Court in its order and opinion denying the respondent's demand for jury trial relied heavily on cases dealing with the award of back pay in discrimination cases brought under Title VII of the Civil Rights Act of 1964. It is the position of the *Amicus* that these cases are more analogous to the case before this Court.

In *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969) and the cases cited therein, the court held with reference to the right to trial by jury in an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*, that:

"... the element of back pay is . . . expressly provided for under the Act itself . . . Under this section, if the court finds illegal employment practices, one available remedy is reinstatement with or without back pay. The demand for back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy, to be determined through the exercise of the court's discretion, and not by a jury."

(Cf. *Smith v. Hampton Training School for Nurses*, 360 F.2d 577 (4th Cir. 1966); Note also *Cheatwood v. South Central Bell Telephone & Telegraph Co.*, 303 F.Supp. 754, 1969; and *Hayes v. Seaboard Coast Line Railroad Co.*, 46 F.R.D. 49, 52-53.)

Similarly in the instant case, the demand for injunctive relief and damages is an integral part of the statutory equitable remedy contemplated by Congress, and likewise is only to be determined by the exercise of the court's discretion—not by jury.

A similar analysis of Federal judicial interpretation of the right to jury trial in proceedings under the

Fair Labor Standards Act, 29 U.S.C. §§ 216 and 217, is also persuasive. Congress, when enacting a remedial statute to enforce rights granted thereunder has traditionally explicitly indicated when the action created is to be equitable. Under Section 17 of the Fair Labor Standards Act (29 U.S.C. § 217), the district courts are vested with jurisdiction to restrain violations of the Act, including the withholding of the payment of minimum wages and overtime compensation. The nature of the action under that provision was held by the court to address itself to future violations, and thus, there was no right to trial by jury. *Wirtz v. Jones*, 340 F.2d 901, 902 (5th Cir. 1965). Note also *Wirtz v. Robert E. Bob Adair, Inc.*, 224 F. Supp. 750, (W. D. Ark., 1963), where the court held that denial of the right to trial by jury of a back pay order sought by the Secretary of Labor, suing to enjoin an employer's withholding of minimum wages and overtime compensation and to enjoin future violations was not violative of the Seventh Amendment guarantee.

Section 16 of that Act (29 U.S.C. § 216) provides an alternative remedy to the individual employee and creates an independent cause of action. If the analysis of the Court of Appeals is carried to its logical conclusion under *Ross v. Bernhard, supra*, it is not inconsistent to conclude that the issues of back pay and liquidated damages brought under Section 16 by an individual on behalf of himself and others similarly situated would require a trial by jury on the issues of the amount in question. *Olearchick v. American Steel Foundries*, *Martin v. Carnegie-Illinois Steel Corp.*, 73 F. Supp. 273 (W.D. Pa. 1947); *Wirtz v. Thompson Packers, Inc.*, 224 F. Supp. 960 (E. D. La. 1963). The action under Section 16(b) is in the form of a suit for

money judgment, without any requirement that it be brought in the form of injunctive relief. Only Section 17 speaks to the remedy of injunction.

To that extent, it is the position of the *Amicus* that the analogy of this case to those brought under Section 17 is a proper one. Both actions are granted to enforce rights granted under the statutes and both are expressly designed to restrain violations. The equitable nature of the remedies created is unmistakably clear. Nothing under *Ross v. Bernhard* and the cases cited therein requires a different conclusion.

II. Title VIII of Civil Rights Act of 1968 Is A Remedial Statute To Be Liberally Construed To Effect the Objective Sought

The purpose of the Fair Housing Act is clear—to enunciate a national policy of fair housing throughout the United States and provide a complete remedy to private persons whose civil rights have been violated.

Though the Secretary of Housing and Urban Development is charged with certain administrative duties under the Act to obtain voluntary compliance the primary mode of enforcement of the Act is civil actions by a private citizen seeking redress not only for the violation of his own civil rights but also acting "as private attorney general in vindicating a policy that Congress declared to be of the highest priority." *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 211.

The Fair Housing Act, Section 814, requires expedient judicial determination of the claims presented. Congress did not enact that provision without careful consideration of the nature of the fundamental

right granted and the circumstances of the persons the Act was designed to protect. To remove one of the many insidious badges of slavery and to guarantee to minorities an absolute right to obtain interests in real property was clearly the intent of the drafters of this legislation. And by and large, racial minority persons have resorted to the remedies under the Act much more frequently than other groups.¹⁰

Jury trials, being inherently cumbersome, expensive and complicated, would only erect an obstacle to the enforcement of the Act by private citizens, who can ill afford the luxury of legal gymnastics respecting a need as basic and essential as shelter. The aggrieved private citizen who seeks enforcement under Section 812 is generally in need of immediate housing accommoda-

¹⁰ For fiscal year ending July 30, 1972, the Department of Housing and Urban Development reported that 2,159 complaints had been filed under Title VIII of the Fair Housing Act, of which approximately 1800 alleged racial discrimination in housing;

The Leadership Council for Metropolitan Open Communities (of greater Chicago) reported that since 1969 it has litigated over 200 suits under the Act on behalf of minorities. Ninety-five (95) percent of those served were Black;

The Justice Department has filed over 149 pattern and practice suits under the Act—all but one filed on behalf of racial minorities;

The files of the N.Y. State Division of Human Rights indicate that of a total of 516 complaints filed alleging discrimination in housing for the year 1972, 379 were filed by racial minorities.

As the statistics unravel it becomes obvious that the primary medium through which minorities assert their rights to equal opportunity in housing is under the Fair Housing Act. The nature and extent to which minorities are still subjected to the indignities of racial prejudice looms clear. For these beneficiaries under the Act, the effect and consequences of a jury trial under Section 812 would be to unduly delay final enforcement of a constitutionally guaranteed right (See *Jones v. Mayer Co., supra*).

tions. The drafters of the Act recognized the urgency of that need by providing that a complainant could commence a civil action, upon the respondent's failure to voluntarily comply with the Secretary's efforts to correct the alleged discriminatory housing practice 30 days after such failure. If Section 812 is read to entitle a respondent in a civil action to a jury trial, injunctive relief depending on the back log on a jury calendar will not afford the claimant the adequate remedy contemplated by the Act. With adequate housing accommodations becoming increasingly more difficult to obtain, the claimant cannot afford the luxury of time to have his rights adjudicated and a remedy decreed. If immediate determination is not made, the aggrieved party will generally have no alternative but to seek alternative housing accommodations and to forego injunctive relief.

Congress further indicated it contemplated precisely such a problem by enacting Section 814 requiring expeditious resolution of a claim. To interpret the Act as requiring otherwise will afford the intended beneficiaries, at the most, nominal relief in the form of special or punitive damages which can in no way compensate for the indignity and humiliation suffered as a result of a violation. The attendant effect of such a requirement would be to foster a nullification of the primary thrust and purpose of the statute and to create an unjust and absurd result. General rules of statutory construction require that remedial statutes be liberally construed to accomplish their purpose, here the affording of a private remedy to persons injured by a wrongful act.

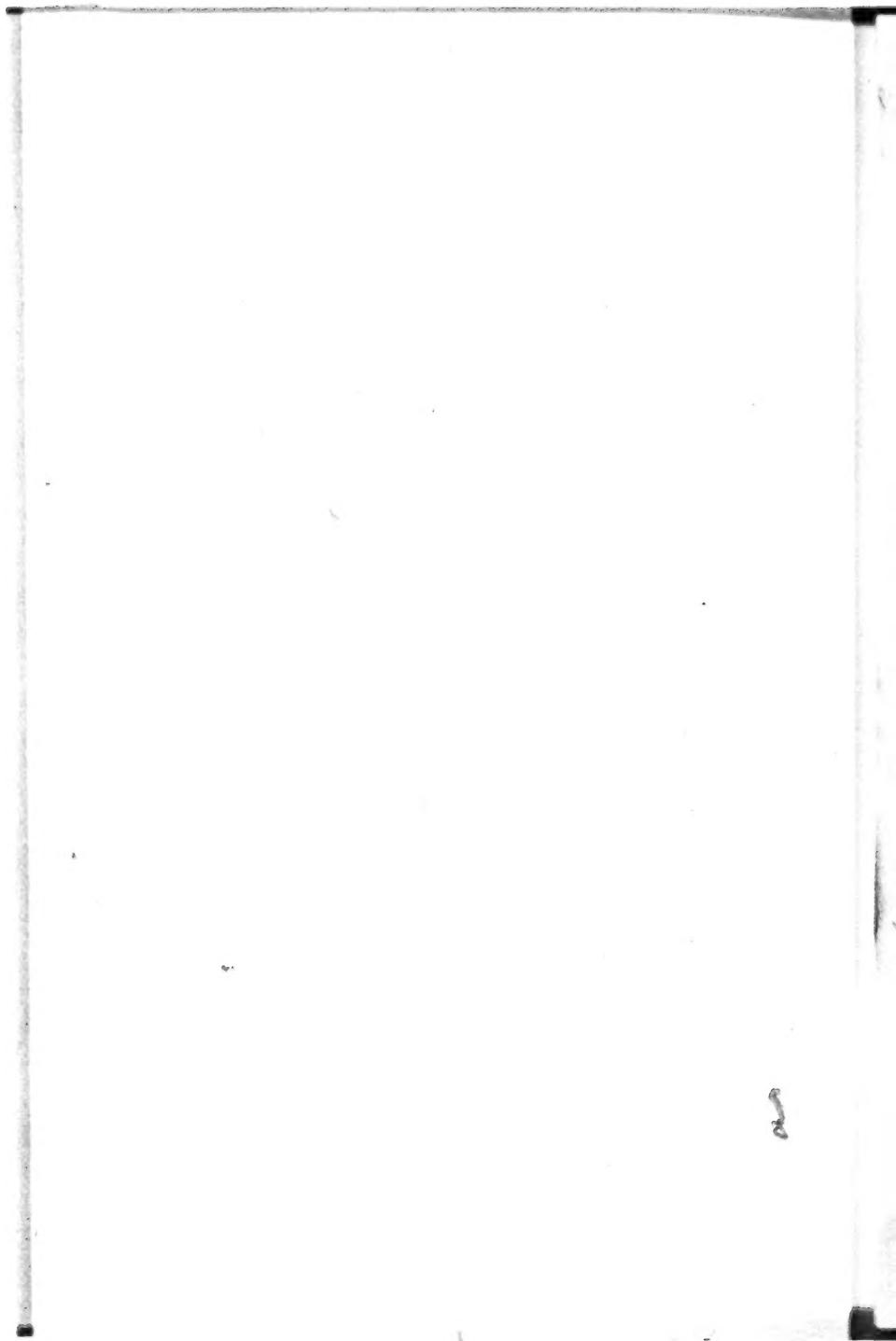
Civil rights statutes especially should be construed in such a fashion in order to carry out the purpose

of Congress to eliminate inconvenience, unfairness, and humiliation. *United States v. Johnson Lake Inc.*, 312 F. Supp. 1376; Civil Rights Act, 1964, Section 201, 42 U.S.C. 2000(a).

CONCLUSION

It is respectfully submitted that the decision of the Court of Appeals should be reversed and the District Court's order and opinion of May 19, 1970, be reinstated.

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LIBRARY APPENDIX
SUPREME COURT, U. S.

AUG 10 1973

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 72-1035

JULIA ROGERS,

Petitioner,

—v.—

LEROY LOETHER and MARIANE LOETHER,
his wife, and MRS. ANTHONY PEREZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 26, 1973
CERTIORARI GRANTED JUNE 11, 1973

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973
No. 72-1035

JULIA ROGERS,

Petitioner,

—v.—

LEROY LOETHER and MARIANE LOETHER,
his wife, and MRS. ANTHONY PEREZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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Chronological List of Relevant Docket Entries

November 7, 1969 Plaintiff's complaint filed in the U.S. District Court for the Eastern District of Wisconsin.

November 17, 1969 Temporary restraining order granted.

November 17, 1969 Plaintiff's motion for a preliminary injunction filed.

November 20, 1969 Preliminary injunction granted after hearing.

December 2, 1969 Defendant's answer filed.

December 19, 1969 Order granting preliminary injunction filed.

January 5, 1970 Pre-trial conference.

February 10, 1970 Pre-trial order filed.

April 30, 1970 Hearing on defendant's motion for a jury trial.

May 7, 1970 Pre-trial order filed.

May 19, 1970 Opinion and order of the District Court denying jury trial.

June 15, 1970 Plaintiff's statement of uncontested facts and plaintiff's statement of contested facts filed.

June 22, 1970 Status conference.

July 6, 1970 Pre-trial order.

October 26
and 27, 1970 Trial.

January 5, 1971 Defendants' notice of appeal filed.

Complaint, filed November 7, 1969

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WISCONSIN

CASE No. 69-C-524

JULIA ROGERS,

Plaintiff,

—v.—

**LEROY LOETHER, AND MARIANE LOETHER, HIS WIFE,
AND MRS. ANTHONY PEREZ,**

Defendants.

Now comes the plaintiff, Julia Rogers, by her attorneys, Milwaukee Legal Services by Seymour Pikofsky, and respectfully represents to this Honorable Court as follows:

1. That this proceeding is brought under Title 42, Sections 3601-3631, United States Code, as hereinafter more fully appears.
2. That plaintiff is a United States citizen and a citizen of the Eastern District of Wisconsin residing therein at 3160 North 1 Street, in the City and County of Milwaukee.
3. That defendants LeRoy Loether and Mariane Loether, his wife, are adult citizens of the United States and the Eastern District of Wisconsin, residing therein at W142 N7124 Oakwood Drive, in the City of Menomonee Falls.
4. That the defendant Mrs. Anthony Perez, is an adult citizen of the United States and the Eastern District of

Complaint, filed November 7, 1969

Wisconsin, residing therein at 2527 North Fratney Street, in the City and County of Milwaukee.

5. That the defendants, LeRoy and Mariane Loether have been and are now the owners of a certain duplex located at 2527-2529 North Fratney Street, in the City and County of Milwaukee, State of Wisconsin, within the jurisdiction of this Court, said property being described as follows:

Barber and Platto's Subdivision in the South West
One Quarter ($\frac{1}{4}$), 16-7-22, Lot Four (4), North
One Half ($\frac{1}{2}$), Lot Five (5).

6. That said defendant Mrs. Anthony Perez occupies the lower half of said duplex and was empowered by defendants, LeRoy Loether and Mariane Loether, his wife, to show the upper half to prospective tenants.

7. That for the last several weeks, plaintiff Julie Rogers has been confined to the hospital.

8. That plaintiff requested a friend of hers, to-wit, Jacqueline Haessly, to look for an apartment for her and her family.

9. That on Thursday, October 30, an ad appeared in the Classified Section of the Milwaukee Journal offering for rent the upper half of the duplex located at 2527-29 North Fratney Street, in Milwaukee, Wisconsin.

10. That Miss Haessly contacted defendant, Mrs. Anthony Perez and made arrangements to see the apartment.

Complaint, filed November 7, 1969

11. That Miss Haessly informed Mrs. Perez that she was looking at the apartment for a friend of hers who was in the hospital at the time.

12. That Miss Haessly informed Mrs. Perez that she would take the apartment and was informed by Mrs. Perez that the Loethers would have to make the final decision and that they would be coming over that evening.

13. That Miss Haessly asked if Mrs. Perez would take a deposit then and there.

14. That Mrs. Perez then called Mrs. Loether and explained the situation to her and Miss Haessly then spoke to Mrs. Loether.

15. That Mrs. Loether asked Miss Haessly various questions regarding the size and status of the family to be living there and that Miss Haessly gave her all the information requested.

16. That Mrs. Loether then told Miss Haessly that she would accept a \$50.00 deposit and Miss Haessly gave to Mrs. Perez her check for the deposit.

17. That subsequent to the acceptance of the deposit, Mrs. Loether called plaintiff at the hospital to talk with her.

18. That subsequent to her conversation with plaintiff herein, Mrs. Loether called Miss Haessly and told her that she understood plaintiff herein was of the Negro race and that Miss Haessly had failed to inform her of this.

Complaint, filed November 7, 1969

19. That Mrs. Loether then stated to Miss Haessly that she would discuss the possible rental of the apartment to Mrs. Rogers with defendant, Mrs. Perez and her husband.

20. That Miss Haessly then discussed the matter with the Perez' who said that the decision would have to be the Loether's.

21. That Miss Haessly called Mrs. Loether back and informed her that the Perez' had no objection and that it would be up to the owners.

22. That Mrs. Loether informed Miss Haessly that they would still have to talk it over that night and that they would let Mrs. Rogers know.

23. That subsequent to that time Mrs. Loether informed plaintiff herein that they were not going to rent the apartment but were going to keep it vacant.

24. That Miss Haessly is Caucasian.

25. That Mrs. Rogers is Negro.

26. That contrary to Title 42, Section 3604, United States Code, defendants have discriminated against plaintiff in the terms, conditions, and privileges of rental of a dwelling because plaintiff is a Negro.

27. That contrary to Title 42, Section 3604 United States Code, defendants have refused to negotiate for and have otherwise made unavailable a dwelling to plaintiff because she is a Negro.

Complaint, filed November 7, 1969

28. That plaintiff is informed and believes that unless restrained by this Honorable Court, the defendants will continue to violate Section 3604, Title 42, of the United States Code in the manner herebefore alleged.

WHEREFORE, plaintiff demands judgment against the aforesaid defendants in the sum of \$1,000.00 punitive damages, together with costs and disbursements of this action, that the defendants be directed to abide by their agreement to rent the above described premises to the plaintiff; that a temporary Restraining Order be granted restraining the defendants as prayed hereinbefore, since, as shown by the attached Affidavit, immediate and irreparable injury and damage will result to the plaintiff; that the defendants be enjoined and restrained as herein prayed during the pendency of this action; and that the Court grant what ever other and further relief as it may deem just and proper.

/s/ JULIA ROGERS
Julia Rogers

SEYMOUR PIKOFSKY
Attorney for Plaintiff
Milwaukee Legal Services
2218 North Third Street
Milwaukee, Wisconsin 53213
Tel: 372-7400

Affidavit of Jacqueline Haessly, filed November 7, 1969

**STATE OF WISCONSIN,
MILWAUKEE WISCONSIN, ss.:**

MISS JACQUELINE HAESSLY, being first duly sworn, on oath deposes and says:

1. That she is a citizen of the United States residing in the City of Milwaukee, Wisconsin, within the jurisdiction of this Court.
2. That she is Caucasian.
3. That she is a friend of the Plaintiff herein, Julie Rogers.
4. That plaintiff herein asked your affiant to attempt to find an apartment for her since she was confined to the hospital at the time.
5. That on October 30, 1969, affiant observed an advertisement in the Classified Section of the Milwaukee Journal offering for rent the upper half of a duplex located at 2529 North Fratney Street, in the City and County of Milwaukee, State of Wisconsin.
6. That on October 30, 1969, your affiant spoke with Mrs. Anthony Perez about the apartment and later that day went to see it and was shown it by Mrs. Perez.
7. That on October 30, 1969, your affiant spoke with Mrs. LeRoy Loether one of the owners, of the building and arranged with her to accept a deposit on the property, informing her that she was acting in behalf of a friend of hers, to-wit, the plaintiff herein.

Affidavit of Jacqueline Haessly, filed November 7, 1969

8. That your affiant gave to Mrs. Loether the phone number of the plaintiff herein.
9. That after Mrs. Loether accepted the deposit of \$50.00 on the premises hereinbefore described, she called plaintiff herein and discovered that the person to occupy the premises was of the Negro race.
10. That subsequent to the conversation with plaintiff herein, Mrs. Loether telephoned your affiant and stated to her that she had not told her that she was renting it for a Negro and that she did not know if they could rent it on that basis.

/s/ **JACQUELINE HAESSLY**
Jacqueline Haessly

Subscribed and sworn to before
me this 6th day of November, 1969.

SEYMOUR PIKOPSKY

Notary Public, Milwaukee County, Wisconsin

My Commission is permanent.

Affidavit of Mariane Loether, filed November 17, 1969

MARIANE LOETHER, being duly sworn, deposes and says:

1. I am the wife of Leroy Loether and my husband and I are the joint owners of the duplex and property located at 2527-2529 North Fratney Street, in the City and County of Milwaukee, State of Wisconsin. I have personal knowledge of the matters hereinafter referred to, and make this affidavit in opposition to the plaintiff's motion for a temporary restraining order.

2. I have never refused to rent the aforesaid property to any person, including the plaintiff, because of their race, color, religion, or national origin. Upon being advised by the plaintiff in a telephone conversation on October 30, 1969, that she was a Negro, I told her that her race would not make any difference in the rental of the property to her. On October 31, 1969, I visited the plaintiff in the hospital and repeated that the decision to rent the property would not be made with reference to the race of any applicant, including herself.

3. The monthly rental for the three-bedroom unit of the duplex in question is one hundred and ten dollars (\$110.00) a month. This same monthly rent is being paid by the occupants of the other unit at the duplex.

Dated at Milwaukee, Wisconsin, this 17th day of November, 1969.

/s/ **MARIANE LOETHER**
Mariane Loether

Subscribed and sworn to before me
this 17th day of November, 1969.

ROBERT D. SCOTT
Notary Public, State of Wisconsin.
My Commission is permanent.

Temporary Restraining Order, filed November 17, 1969

Plaintiff having filed a complaint praying for a temporary restraining order, for a preliminary injunction, and plaintiff having filed an affidavit in support thereof, and the Court having considered the complaint and supporting affidavit, and the plaintiff having appeared by Seymour Pikofsky and the defendant having appeared by Atty. Robert D. Scott, and it appearing that the defendants will continue to violate Sections 3601-3631, Title 42, United States Code unless restrained by order of this Court, and unless restrained herein pending a hearing on plaintiff's motion for a preliminary injunction, will continue to cause immediate and irreparable injury and damage to the plaintiff:

IT IS ORDERED that the plaintiff's prayer for a temporary restraining order be and hereby is granted.

IT IS FURTHER ORDERED that the defendants be restrained and enjoined from directly or indirectly renting or otherwise disposing of a vacant upper half of a duplex house located at 2529 North Fratney Street, in the City and County of Milwaukee, State of Wisconsin within the jurisdiction of this Court, the legal description of said property being as follows:

Barber and Platto's Subdivision in the South West One Quarter (1/4), 16-7-22 Lot Four (4) North One Half (1/2), Lot Five (5).

Unless otherwise ordered by this Court, this order shall expire on Thurs., Nov. 20, 1969, at which time the motion for a preliminary injunction will be held at 10 A.M.

Issued this 17th day of Nov., 1969, at Milwaukee, Wisconsin.

/s/ JOHN W. REYNOLDS
United States District Judge

Answer, filed December 2, 1969

Now come the defendants, LeRoy Loether, Mariane Loether and Mrs. Anthony Perez by their attorneys, Frisch, Dudek, Slattery and Denney and for an answer to the complaint herein, admit, deny, qualify and allege as follows:

1. Answering paragraph One (1), admit the allegations contained therein, but allege with respect to Title 42, Sections 3601-3631, United States Code, that these statutes, particularly Section 3610 (d), provide that no civil action may be brought in any United States District Court if the person aggrieved has a judicial remedy, under a state or local fair housing law which provides rights and remedies for alleged discriminatory housing practices which are substantially equivalent to the rights and remedies provided in sub-chapter I, Chapter 45, Title 42, United States Code.
2. Answering paragraph two (2) deny knowledge or information sufficient to form a belief as to the citizenship and residence of the Plaintiff and therefore deny the same and put the Plaintiff to her proof thereof.
3. Answering paragraphs three through six inclusive (3-6), nine and ten (9-10), and twenty-four and twenty-five (24-25), admit the allegations contained therein.
4. Answering paragraphs seven and eight (7-8), deny knowledge or information sufficient to form a belief that Julie Rogers had been confined to a hospital for several weeks, or for any other period of time, and that Jacqueline Haessly is a friend of the Plaintiff, and that Mrs. Rogers requested Jacqueline Haessly, or any other person,

Answer, filed December 2, 1969

to look for an apartment for her, and therefore deny the same and put the Plaintiff to her proof thereof.

5. Answering paragraph eleven (11), admit that Miss Haessly told Mrs. Perez, among other representations, that she was looking for an apartment for a hospitalized friend.

6. Answering paragraphs twelve through fifteen inclusive (12-15), deny the sequence of events as set forth therein and allege with respect thereto that Miss Haessly represented to Mrs. Perez and Mrs. Loether that Mrs. Rogers would be interested in renting the apartment and offered to make a deposit thereon.

Further answering paragraphs twelve through fifteen inclusive (12-15), allege that in her conversation with Miss Haessly, the Defendant Mrs. Loether, advised her that the rental of the apartment was contingent upon a favorable personal interview with the prospective tenant and that no deposit was necessary until the interview would take place.

Further answering paragraphs twelve through fifteen inclusive (12-15), deny that Miss Haessly gave all the information requested by Mrs. Perez and Mrs. Loether and allege with respect thereto, that Miss Haessly was unresponsive and evasive as to the questions posed to her regarding the qualifications of the prospective tenant.

7. Answering paragraph sixteen (16), deny that Mrs. Loether told Miss Haessly that she would accept a deposit in the amount of \$50.00 or any other amount.

8. Answering paragraph seventeen (17), deny that any deposit was accepted.

Answer, filed December 2, 1969

9. Answering paragraph eighteen (18), deny the allegations contained therein and allege with respect thereto that in Mrs. Loether's conversation with Mrs. Rogers, the latter raised the question as to why Miss Haessly had veiled the fact that she was of the Negro race and requested Mrs. Loether to find out why this was done.

Further answering paragraph eighteen (18), allege that upon Mrs. Loether's telephone call to Miss Haessly at the behest of Mrs. Rogers, Miss Haessly did not respond to Mrs. Rogers' question but asserted that the apartment had to be rented to Mrs. Rogers and threatened Mrs. Loether with coercion by legal process.

10. Answering paragraph nineteen (19), deny the allegations contained therein.

11. Answering paragraphs twenty through twenty-two inclusive (20-22), deny the sequence of the conversations as alleged therein and allege with respect thereto that Miss Haessly misrepresented Mrs. Loether's conversation to Mrs. Perez.

Further answering paragraphs twenty through twenty-two (20-22) allege that Mrs. Loether informed Miss Haessly that the impediment to rental of the apartment had developed as a direct result of Miss Haessly's threat and the demeanor and manner in which she conducted herself in attempting to arrange for the rental of the apartment.

12. Answering paragraph twenty-three (23), admit that Mrs. Loether subsequently informed Mrs. Rogers that the apartment would not be rented and allege with respect thereto that Mrs. Rogers was informed that the impedi-

Answer, filed December 2, 1969

ment to the rental of the apartment was the threat made by Miss Haessly and the demeanor and manner in which she conducted herself in attempting to arrange for the rental of the apartment.

13. Answering paragraphs twenty-six and twenty-seven (26-27), deny the allegations contained therein.

14. Answering paragraph twenty-eight (28) deny that the Defendants are violating or have violated Section 3604, Title 42, of the United States Code as alleged, or in any other manner.

Further answering paragraph twenty-eight (28) deny knowledge or information sufficient to form a belief that the Plaintiff is informed and believes that the Defendants will continue to violate the said section of the United States Code as alleged and therefore deny the same and put the plaintiff to her proof thereof.

AFFIRMATIVE DEFENSES

* * * * *

As and for a first affirmative defense these Defendants allege that they have made available for rent the dwelling in question to every prospective tenant and have negotiated therefore without regard to the race, color, religion, or national origin of any person, and these Defendants remain ready and willing to rent the dwelling in question to any person of the Negro race, excepting the Plaintiff herein.

As and for a second affirmative defense these Defendants allege that the Plaintiff was not a bona fide applicant for the dwelling in question.

Answer, filed December 2, 1969.

As and for a third affirmative defense these Defendants allege that the denial of rental to the Plaintiff herein was directly and solely caused by the conduct, demeanor, lack of candor and threatened coercion of Jacqueline Haessly.

WHEREFORE, the Defendants demand judgment dismissing the complaint of the Plaintiff on its merits and for their costs and disbursements in this action.

/s/ **EDWARD A. DUDEK**
Edward A. Dudek
For: Frisch, Dudek,
Slattery and Denny
Attorneys for Defendants

DEMAND FOR A JURY TRIAL

The Defendants and each of them hereby demand trial by jury of the issues of fact in this action.

/s/ **EDWARD A. DUDEK**
Edward A. Dudek
For: Frisch, Dudek,
Slattery and Denny
Attorneys for Defendants

Certificate Of Service Shows Service on 2d day December, 1969.

/s/ **ROBERT D. SCOTT**

**Order Granting Preliminary Injunction,
filed December 19, 1969**

This cause having come on to be heard on plaintiff's motion for a preliminary injunction on November 20, 1969, and due notice having been given to the defendants; and defendants, Mariane Loether and Mrs. Anthony Perez, having appeared in person and by Attorney Robert Scott, and defendant LeRoy Loether having appeared by Attorney Robert Scott; and the Court having considered the stipulation of facts entered into by all of the parties, the Court having considered the testimony given by the parties and witnesses, the Court having considered the arguments of counsel, and the Court having granted a preliminary injunction on the record and being fully advised in the premises;

IT IS ORDERED:

1. That the temporary restraining order hereinbefore entered be and it is hereby vacated.
2. That the defendants be and they are hereby temporarily enjoined from directly or indirectly renting or otherwise making unavailable the upper half of a duplex located at 2529 North Fratney Street, Milwaukee, Wisconsin, legally described as:

Barber's and Platto's Subdivision in the South West One Quarter ($\frac{1}{4}$), 16-7-22, Lot Four (4), North One Half ($\frac{1}{2}$), Lot Five (5);

unless and until the applicable provisions of the Fair Housing Act of 1968 have been complied with. This preliminary injunction will remain in effect pending final determination of this case on the merits.

*Order Granting Preliminary Injunction,
filed December 19, 1969*

3. That no bond shall be required of the plaintiff.
4. That the matter is hereby set down for a pre-trial conference on January 5, 1970, at 4:00 P.M. in Room No. 471, Federal Building, Milwaukee, Wisconsin.

Dated at Milwaukee, Wisconsin, this 19th day of December, 1969.

JOHN W. REYNOLDS
U. S. District Judge

Pre-trial Order, filed February 10, 1970

The above captioned matter having come on for pre-trial on the 5th day of January, 1970, before the Honorable John Reynolds, and the plaintiff appearing by her attorney, Milwaukee Legal Services by Seymour Pikofsky, and the defendants appearing by their attorneys, Frisch, Dudek, Slattery, and Denny, by Edward A. Dudek and Robert D. Scott,

NOW THEREFORE IT IS ORDERED,

1. That the above captioned matter is to be tried to the Court.
2. That said trial is set for March 23, 1970, at 9:30 o'clock A.M., before the Honorable John Reynolds, Judge, without further notice to any of the parties.
3. That the evidence taken at the hearing on Plaintiff's motion for a Preliminary Injunction is to be incorporated at the trial.
4. That the issues to be tried are the issue of discrimination and the issue of actual damages suffered by the plaintiff.
5. That if the defendants wish to take depositions of the plaintiff and of her witness, Jacqueline Haessly, said depositions are to be taken by February 15, 1970.
6. That the witnesses are to be sequestered during discovery proceedings.
7. That the defendants are to notify the Court by February 15, 1970, if they wish a jury trial with supporting

Pre-trial Order, filed February 10, 1970

briefs and that the plaintiff shall have ten (10) days in which to respond to said briefs.

8. That a report is to be made to the Court by February 19, 1970, as to the settlement offer made at the pre-trial conference.

Dated at Milwaukee, Wisconsin, this 10th day of February, 1970.

BY THE COURT:

/s/ JOHN W. REYNOLDS
John Reynolds, Judge

Pre-trial Order, filed May 7, 1970

ORDER FOLLOWING CONFERENCE HELD APRIL 30, 1970

At a conference held on April 30, 1970, following a court hearing on defendants' motion for a jury trial, Seymour Pikofsky and Otto Tucker appearing for the plaintiff and Robert Scott appearing for the defendants, the following stipulations and orders were made:

1. All discovery is to be completed by May 16, 1970, or be forever waived. The parties are to answer the questions propounded so far.
2. Plaintiff is to draft her comprehensive statement in narrative form as asked for in the attached standing final pretrial order and submit it to defense counsel not later than May 29, 1970.
3. Not later than May 29, 1970, counsel for all parties are to file with the court a statement in narrative form as to the contested and uncontested facts.
4. Not later than May 29, 1970, counsel for all parties are to file with the court a statement of the issues that they believe need to be tried.
5. Not later than May 29, 1970, counsel for all parties are to file with the court all of the other items set forth in the attached copy of the standing final pretrial order.
6. A status conference is hereby scheduled for June 22, 1970, at 4:00 P.M., in Room No. 471, Federal Building, Milwaukee, Wisconsin.

Pre-trial Order, filed May 7, 1970

Dated at Milwaukee, Wisconsin, this 7th day of May, 1970.

JOHN W. REYNOLDS
U. S. District Judge

STANDING FINAL PRETRIAL ORDER

(Civil Case)

For a good cause shown, IT IS ORDERED that in preparation for trial, counsel shall meet with each other not later than 20 days before the recited date for the final pretrial conference, and together prepare a report as directed below; that counsel for the plaintiff has the principal burden of composing the report which is to be submitted to the court and opposing counsel at least one week before the final pretrial conference; and that this report shall contain the following:

- a. A comprehensive statement of all uncontested facts. If the case will be tried before a jury, it is contemplated that such statement will be read to the jury, and no proof will be received on the matters covered.
- b. An agreed statement of contested facts. If counsel are unable to agree on all points, separate additional statements may be submitted.
- c. Lists containing the names and addresses of each side's prospective witnesses. It is contemplated that other witnesses will not be permitted to be called except upon a showing of surprise.
- d. Lists of the names and addresses of each side's prospective expert witnesses, together with a stipulated narrative statement of each such expert's background and

Pre-trial Order, filed May 7, 1970

qualifications. If the case will be tried before a jury, it is contemplated that such statement will be read to the jury, and no proof will be received on the matters covered.

- e. A schedule of all exhibits to be offered at the trial indicating those to which objection will be made with a brief statement as to the grounds for such objection.
- f. An itemized statement of special damages.
- g. A list of depositions, or portions thereof, to be offered at the trial with a brief statement indicating those portions to which objection will be made with a brief statement as to the grounds for objection.
- h. A list of proposed questions which counsel desire to be submitted by the court to the jury on voir dire.

JOHN W. REYNOLDS
U. S. District Judge

**District Court's Opinion and Order
Denying Demand for Jury Trial**

May 19, 1970

REYNOLDS, District Judge.

This is an action brought under Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-3619, which prohibits discrimination in the rental of housing. Plaintiff claims that defendants discriminated against her by refusing to rent her an apartment because she is a Negro. Plaintiff requested injunctive relief restraining the rental of the subject apartment except to the plaintiff, money damages for loss incurred by the plaintiff due to the alleged discrimination, punitive damages in the amount of \$1,000, and attorney's fees.

The court granted plaintiff's motion for a temporary restraining order on November 17, 1969, and, following an extended hearing, entered a preliminary injunction temporarily restraining the rental of the apartment pending final determination of the case. At a hearing on April 30, 1970, the Court, with consent of plaintiff, dissolved the preliminary injunction. Therefore, the only issues remaining in the suit are plaintiff's claim for compensatory and punitive damages and attorney's fees.

The defendants have requested a jury trial on these issues, and plaintiff has objected to this request. The parties have submitted briefs and argued to the court on this issue which is now before the court for decision.

[1, 2] To warrant a jury trial, a claim must be of such a nature as would entitle a party to a jury at the time of the adoption of the Seventh Amendment. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed.

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893 (1936); *United States v. Louisiana*, 339 U.S. 699, 70 S.Ct. 914, 94 L.Ed. 1216 (1950). The question before this court, therefore, is whether the cause of action under 42 U.S.C. §§ 3601-3619 is one recognized at common law which consequently requires a jury trial. I find that this cause of action is a statutory one invoking the equity powers of the court, by which the court may award compensatory and punitive money damages as an integral part of the final decree so that complete relief may be had. The action is not one in the nature of a suit at common law, and therefore there is no right to trial by jury on the issue of money damages in the case.

Defendant argues that the Seventh Amendment of the Constitution; *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959); *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486 (5th Cir. 1961); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962); *Harkless v. Sweeny Independent School District*, 278 F.Supp. 632 (S. D. Texas 1968); and *Ross v. Bernhard*, 396 U.S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970), require a jury trial on the issue of plaintiff's prayer for money damages due to the alleged discrimination.

Beacon, *Dairy Queen*, and *Thermo-Stitch* hold that where equitable and legal claims are joined in the same cause of action, there is a right to trial by jury on the legal claims that must not be infringed by trying the legal issues as incidental to the equitable issues or by a court trial of common issues between the two. The Court in *Swofford v. B & W, Inc.*, 336 F.2d 406, 414 (5th Cir. 1964), commented on these cases:

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"* * * This is not to say, however, that they have converted typical non-jury claims, or remedies, into jury ones. Therefore, we reject a view that the trio of Beacon Theatres, Dairy Queen, and Thermo-Stitch is a catalyst which suddenly converts *any* money request into a money claim triable by jury."

The *Harkless* court granted a jury trial on the issue of back pay award in an action brought under 42 U.S.C. § 1983 seeking reinstatement as teachers following a discharge allegedly based on racial discrimination. However, § 1983 expressly provides that persons acting under color of state law who deprive other persons of constitutional rights shall be liable "in an action at law." There is no such provision in 42 U.S.C. § 3612(c).

The Supreme Court in *Ross* held that plaintiffs in a shareholder's derivative action had a right to a jury trial on those issues to which the corporation, had it brought the action itself, would have had the right to a jury trial. The Court found that where the claims asserted were damages against the corporation's broker under the brokerage contract and rights against the corporate directors because of their negligence, both actions at common law, " * * * it is no longer tenable for a district court, administering both law and equity in the same action, to deny legal remedies to a corporation, merely because the corporation's spokesmen are its shareholders rather than its directors. * * *" 396 U.S. at 540, 90 S.Ct. at 739. While *Ross* may reflect "an unarticulated but apparently overpowering bias in favor of jury trials in civil actions," *Ross, supra*, at 551, 90 S.Ct. at 745, Justice Stewart dissenting, the case does

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not stand for the proposition that any money claim in a cause of action must be tried by a jury. The decision deals narrowly with the right to jury trial in a shareholder's derivative action and is clearly distinguishable from the case before this court.

The section of the statute dealing with remedies for violation of the act, 42 U.S.C. § 3612(c), provides:

"(c) *The court* (emphasis added) may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than \$1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, That the said plaintiff *in the opinion of the court* (emphasis added) is not financially able to assume said attorney's fees."

On its face, this statutory language seems to treat the actual damages issue as one for the trial judge rather than a jury. District courts in *Hayes v. Seaboard Coast Line Railroad Co.*, 46 F.R.D. 49 (S.D.Ga.1969), and *Cheatwood v. South Central Bell Telephone and Telegraph Co.*, 303 F.Supp. 754 (M.D.Ala. 1969), have construed similar language in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g),* to mean that the issue of back pay

* "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, *the court* may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may

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award in employment discrimination cases does not require jury determination.

Both *Hayes* and *Cheatwood* held that the money damages issue of back pay in an action under 42 U.S.C. § 2000e-5(g) of the 1964 Civil Rights Act was not a separate legal issue, but rather was a remedy the court could employ for violation of the statute in a statutory proceeding unknown at common law, and that there was no right to a trial by jury on that issue. As I have noted, the language of the remedial provisions of 42 U.S.C. § 2000e-5(g) of the Civil Rights Act of 1964 and 42 U.S.C. § 3612(c) of the Civil Rights Act of 1968 are very similar. The purpose of the two acts is similar. Title VII of the 1964 Act prohibits discrimination on the basis of race, color, religion, sex, or national origin by specified groups of employers, labor unions, and employment agencies. Title VIII of the 1968 Act prohibits discrimination on the basis of race, color, religion, or national origin in the sale or rental of housing by private owners, real estate brokers, and financial institutions. The award of money damages in a Title VIII action has the same place in the statutory scheme as does the award of back pay in a Title VII action. Determining the amount of a back pay award in a Title VII action can be as difficult a question of fact as determining the amount of money damages in a Title VIII action. *Hayes*, 46 F.R.D. at 53.

An action under Title VIII is not an action at common law. The statute does not expressly provide for trial by

include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). * * * " (Emphasis added.)

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jury of any issues in the action. In the absence of a clear mandate from Congress requiring a jury trial, I find that the similarities between the remedial provisions of the Civil Rights Act of 1964 and 1968, in light of the undivided authority holding that the issue of money damages for back pay under Title VII of the 1964 Act is not an issue for the jury, compel the conclusion that the issue of compensatory and punitive money damages in an action under Title VIII of the 1968 Act is likewise an issue for the court. Accordingly, defendants' request for a jury trial must be denied.

Therefore, it is ordered that defendants' request for a jury trial be and it hereby is denied.

**Plaintiff's Statement of Uncontested Facts,
filed June 1, 1970**

On Thursday, October 30, 1969, an advertisement appeared in the Milwaukee Journal offering for rent an apartment located at 2579 North Fratney Street, Milwaukee, Wisconsin.

The plaintiff Julia Rodgers is Black American. Miss Jacqueline Haesseley is Caucasian.

At the time that the advertisement appeared in the Milwaukee Journal Mrs. Rodgers was hospitalized in St. Mary's hospital in Milwaukee, Wisconsin. The advertisement was seen by Miss Haesseley who called the number given in the ad and spoke to the defendant, Mrs. Anthony Perez. She asked her if it would be possible to see the place. Mrs. Perez told her that she should see the place if she could get there before 5:00 p.m.

Miss Haesseley then went to see the apartment, arriving there about 4:30 p.m. on October 30, 1969. Mrs. Anthony Perez, who is a cousin of the owners of the property, Mrs. and Mr. Leroy Loether, took Miss Haesseley up to see the upstairs apartment.

Miss Haesseley told Mrs. Perez that she was looking at the apartment for a friend of hers who was in the hospital. Mrs. Perez stated that Mr. and Mrs. Loether were coming over that evening and they would have to make the decision as to whether or not Miss Haesseley could have the apartment for Mrs. Rodgers. Miss Haesseley stated that she was very interested in obtaining the apartment for Mrs. Rodgers and asked Mrs. Perez if she, Miss Haesseley should offer a deposit, would the deposit be accepted. Mrs. Perez told Miss Haesseley that she would call Mrs. Loether and let Miss Haesseley speak to her and she could ask her if they would accept a deposit. Mrs. Perez called Mrs.

*Plaintiff's Statement of Uncontested Facts,
filed June 15, 1970*

Loether and Miss Haesseley spoke to her. Mrs. Loether asked various questions about Mrs. Rodgers, including where and why she was hospitalized, the number of children in the family, her marital status, and her financial status.

Mrs. Loether asked to speak to Mrs. Perez again and Mrs. Perez asked Mrs. Loether whether or not she would accept a deposit from Miss Haesseley in behalf of Mrs. Rodgers. Miss Haesseley then gave her \$50.00 check to Mrs. Perez who gave her a written receipt. (Both check and receipt have previously been introduced into evidence and are part of the Court record.)

Mrs. Loether requested of Miss Haesseley and was given the hospital and room number and telephone number where Mrs. Rodgers could be reached and indicated that she would call her.

Mrs. Loether then called St. Mary's Hospital and discussed with her the rental of the apartment, and asking Mrs. Rodgers when she would be out of the hospital and when she could move into the apartment and whether or not she had someone to move her in. During the course of the discussion Mrs. Rodgers mentioned to Mrs. Loether that she was Black American.

Mrs. Loether then called Mrs. Perez back and spoke to Miss Haesseley who was still there. She told her that Mrs. Rodgers sounded like a very nice person. Mrs. Loether indicated that she had no objection to renting to a colored person. They (the Perez) stated that they had no objection to Mrs. Rodgers living upstairs but that they could not make the final decision and that it would have to be up to the Loethers since they were the owners.

Miss Haesseley attempted to call Mrs. Loether the next morning but was unable to reach her. She then called

*Plaintiff's Statement of Uncontested Facts,
filed June 15, 1970*

Mrs. Perez who told her that Mrs. Loether was going out to the hospital that morning to see Mrs. Rodgers. That morning Mrs. Loether and Mrs. Perez visited Mrs. Rodgers at St. Mary's Hospital. They discussed the apartment rental but no decision was given to Mrs. Rodgers. She was informed that the Loethers were going out of town that evening and would be back on Tuesday morning when they would let Mrs. Rodgers know whether or not she could have the apartment. Mrs. Rodgers was informed several days later that the Loethers had decided to keep it vacant for a while and that the deposit Miss Haesseley had given to Mrs. Perez for Mrs. Rodgers would be returned.

During the year of 1968 and during the year of 1969 prior to October 30, 1969, Mrs. Julia Rodgers resided at 3160 North 1st Street in the City and County of Milwaukee. Her landlord during that period was one Adolphus C. Fifer. During her residence at the above address Mrs. Rodgers was responsible for maintaining her fuel supply with the Quickflash Co.

During the third telephone conversation between Miss Haesseley and Mrs. Loether on October 30, 1969 Miss Haesseley told Mrs. Loether that Mrs. Loether "had to rent" the apartment to Mrs. Rodgers.

**Plaintiff's Statement of Contested Facts,
filed June 15, 1970**

At that time and some time prior to October 30, 1969, the plaintiff Julia Rodgers, had been looking for a new place to live. On several occasions Mrs. Rodgers had asked a friend of hers, Miss Jacqueline Haesseley, to look for a place for her also. Prior to this occasion Miss Haesseley had looked at other places for Mrs. Rodgers.

She (Miss Haesseley) answered various questions about her friend, Mrs. Rodgers, including marital status, income, and other questions that were asked by Mrs. Perez. She answered each and every question that Mrs. Perez asked her.

Miss Haesseley answered all questions asked about Mrs. Rodgers.

Miss Haesseley was informed that Mrs. Loether would accept a deposit of \$50.00. Miss Haesseley asked if a check would be acceptable and was told a check would be all right.

Mrs. Loether told Mrs. Rodgers in a telephone call that she could have the apartment. Mrs. Loether then indicated to Mrs. Rodgers that she hadn't known that she was Black and that she was not sure that she could have the apartment.

Mrs. Loether said that she would have to discuss the matter with Mr. and Mrs. Perez because they were the ones who would have to live under Mrs. Rodgers. The phone conversation was then terminated and Miss Haesseley proceeded to discuss the matter of Mrs. Rodgers' race with the Perez.

Miss Haesseley then called Mrs. Loether back and told her that she had discussed the matter with Mr. and Mrs. Perez and that they had no objection and asked her if Mrs. Rodgers still had the place. Mrs. Loether informed Miss

*Plaintiff's Statement of Contested Facts,
filed June 15, 1970*

Haesseley that they would still have to discuss the matter with the Perez and that they would do so that night when they would be coming over. Miss Haesseley informed Mrs. Loether that it was illegal to make race a consideration in the renting of an apartment or other property. Mrs. Loether was to let Miss Haesseley know by 8:00 p.m. whether or not Mrs. Rodgers was going to get the apartment. They did not call that night.

Mrs. Rodgers had previously asked Miss Haesseley to look for places for her which she had done, and also had authorized Miss Haesseley to put down a deposit if she found some place good.

As a result of Mrs. Rodgers being denied the rental of the apartment she suffered an increase in her blood pressure and severe emotional distress and harm which required her remaining in the hospital.

Further, as a result of Mrs. Rodgers being denied the apartment she was forced to make two additional moves necessitating the expenditure by Mrs. Rodgers of an additional \$200.00.

Mrs. Rodgers frequently allowed the fuel supply to be depleted. Prior to October 30, 1969, Mrs. Rodgers had made no complaints concerning her heating in her apartment to her landlord, Mr. Adolphus Fifer. On December 15, 1967, the Quickflash Company made a delivery of 5 gallons of fuel oil after being advised that Mrs. Rodgers' oil had been depleted and at that time refused to extend any further credit to Mrs. Rodgers.

During the period of her residence at 3160 North 1st Street, Mrs. Rodgers came to be regarded as a poor tenant by her landlord because of her failure to supervise her children. She was gone from her home a good deal and

*Plaintiff's Statement of Contested Facts,
filed June 15, 1970*

allowed her children to play without control. On one occasion the children broke down a door in the apartment building which led to another apartment. On another occasion, Mr. Fifer had to caution Mrs. Rodgers because her children were playing with matches in the building.

Thus statement by Miss Haesseley was made in a strident tone of voice and was in the nature of a command to Mrs. Loether. The statement was made without Mrs. Loether's having given any indication that she would not rent the apartment to Mrs. Rodgers or that she considered Mrs. Rodgers' color to be a factor in deciding whether to rent to her. Mrs. Loether asked Miss Haesseley what she meant by saying that the Loethers "had to rent" the apartment and at this moment, Mr. Loether came into the room where his wife was talking on the phone and overheard her asking the question. Mr. Loether then told his wife to tell whoever she was talking with that he did not "have to rent" the apartment to anyone. Mr. Loether gave this direction to his wife without knowing who the party was on the phone or who the prospective tenant was. Mr. Loether responded only to the demand made by an unidentified person to his wife and without any knowledge of the race of any prospective tenant or that race had even been made an issue by any person.

Pre-trial Order, filed July 6, 1970

The above entitled matter having come on for Pre-Trial Conference on the 22nd day of June, 1970 before the Honorable John Reynolds,

And the plaintiff appearing by her attorney Milwaukee Legal Services by Otto L. Tucker and Seymour Pikofsky and the defendants appearing by their attorneys Frisch, Dudek, Slattery, and Denny by Robert Scott:

NOW THEREFORE IT IS ORDERED THAT:

1. The plaintiff shall submit a brief on the issue of actual damages and shall also set forth the actual damages claimed and the evidentiary facts in support of such damages by July 31, 1970.
2. That the defendant shall have until September 1, 1970 to submit a reply brief.
3. That this matter is to be set for trial.

BY THE COURT

/s/ **JOHN W. REYNOLDS**
John W. Reynolds, *District Judge*

Dated at Milwaukee, Wisconsin this 6th day of July, 1970.

filed 7/6/70

Notice of Trial, filed August 19, 1970

TAKE NOTICE that the above-entitled case has been set for COURT TRIAL ON DAMAGE ISSUE at 10:00 A.M., on Monday, October 26, 1970, at Courtroom No. 425, Federal Building, 517 East Wisconsin Avenue, Milwaukee, Wisconsin, before Judge John W. Reynolds.

Date August 19, 1970

RUTH LA FAVE
Clerk

By Roch Carter
Deputy Clerk

To OTTO L. TUCKER and
SEYMOUR PIKOFSKY
Milwaukee Legal Services
2218 North Third Street
Milwaukee, Wisconsin 53212
Attorneys for Plaintiff

ROBERT D. SCOTT
780 North Water Street
Milwaukee, Wisconsin 53202
Attorney for Defendants

【1】

Transcript of Proceedings, October 26 and 27, 1970

Transcript of proceedings had in the above-entitled matter, before the Honorable John W. Reynolds, Judge of said court, commencing on the 26th day of October, 1970, at 10:50 o'clock in the morning.

APPEARANCES:

SEYMOUR PIKOFSKY, Esq.
and

OTTO TUCKER, Esq., Milwaukee Legal Services,
2200 North Third Street, Room 513
Milwaukee, Wisconsin,
appeared on behalf of the Plaintiff;

EDWARD A. DUDEK, Esq.
and

ROBERT D. SCOTT, Esq.,
780 North Water Street,
Milwaukee, Wisconsin,
appeared on behalf of the Defendants;

* * *

【2】 (The following proceedings were had in chambers at 10:50 a.m.:

The Court: I believe you requested a conference.

Mr. Pikofsky: Yes. What we wanted to do, Your Honor, is this: Find out what ground rules we are operating under. Your pre-trial order indicated the only issue to be tried was the issue of damages. The correspondence and other material from Mr. Dudek's office indicated that they are thinking in terms of a trial on the issue of discrimination. This was not our understanding, and I thought

Transcript of Proceedings, October 26 and 27, 1970

before we proceeded, that we ought to have some guidance from the Court as to whether we are following the pre-trial order and the only issue to be tried is the damages or whether we are going into the whole ball of wax.

Mr. Dudek: We didn't interpret your pre-trial order to be that the Court made a finding in advance of trial that the people are guilty of discrimination.

The Court: Under the rules, we held a hearing for preliminary injunction and I made a tentative finding and I feel some additional evidence to offer, I think you have a right to present it, but I don't see any point in having cumulative evidence.

Mr. Dudek: I agree with the Court on that, but we did not put in our entire case at the time of [3] the hearing. We did not have our pleadings in, if I recall, at that time. And we take issue strongly with the case that is attempting to be made out on the issue of discrimination and we so advised the Court each time we were together here.

The Court: Well, I believe that you have a right to present additional evidence, but I don't see any reason to repeat what is already in the record. I reviewed this morning the statement of contested and uncontested facts, and other than your bald assertion, there is no discrimination, I don't know what other facts you are alleging. I am willing to listen. If you have any, I will hear them.

Mr. Dudek: First of all, with reference to the Cross-Examination of the witnesses are concerned, this was not complete at the time that we were on the preliminary hearing.

The Court: What other facts do you plan to prove other than your assertion there was no discrimination? What evidentiary facts?

Transcript of Proceedings, October 26 and 27, 1970

Mr. Dudek: Evidentiary, with reference to the type of people that are involved here. The fact that they have lived since childhood within what is the center of the colored district. The fact that since they were married, they spent seven years in the same [4] area. That they have friends that they have socialized with people that are colored, that colored people they have entertained at their home in family gatherings. That they are also entertained by colored people in their particular homes. Prejudice discriminations is a state of mind. We are talking about people either consciously or unconsciously acting in a biased, prejudiced and intolerant manner, and I don't think you can turn this thing off—off and on with reference to a particular case. But what we have got here are some assumptions that have been made by two plaintiffs on a skinny set of facts and charging these people before there is even a turndown over here, it appears to me, and the position that we take that because of the mere fact that there is a turndown here and she happens to be colored, based by Miss Haesseley that there is an act of discrimination here and we take strong exception to that.

There is nothing even in the record as a *prima facie* case with reference to Miss Perez. I don't know what she's doing in this particular case and there has not been any trial as to that lady. Mr. Loether hasn't had his say with reference to the allegations as they are with reference to him. The burden here, Judge, is that of the Plaintiffs as to each of these Defendants. And all we tried at the time the preliminary [5] injunction was here with reference to the rental was the matter of whether or not they may prevail on a trial. This does not mean that after we come into a full case, a full Cross-Examination, after we learn more of the facts, this matter came on within

Transcript of Proceedings, October 26 and 27, 1970

I think two or three days after this action was started. And before we had a chance to get involved in it. As far as the trial on the damages are concerned, there's been a failure to comply with your pre-trial order that they submit proof as to actual damages. In fact, his letter which the Court has a copy of says that there are no actual damages.

The Court: Yes, I know. So it's really narrowed down to punitive damages.

Mr. Dudek: It's narrowed down to punitive damages and we submit to the Court on this issue of discrimination.

Mr. Tucker: If Your Honor please, I think you are narrowing it too much. I think my letter gives also the position—

The Court: I am not narrowing. You said there was no actual damage.

Mr. Tucker: No actual damage, but I think maybe I am confused in the terms there. What I really have in mind, we may not have actual damages that you can say pinpoint right to there, but you do have actual [6] damages and you would have compensatory damages. When I use that double language, actual damages, what I am trying to say is this, to say that there was actually money out of the pocket to go to Fratney Street and try to rent that house, no, but there are other damages because we did not get the Fratney Street property. We had to do a double move. We had to find—

The Court: That may well be so. But you haven't asserted it.

Mr. Tucker: No. But I expect to bring that forward in showing the compensatory damages there to the Plaintiff.

The Court: Aren't actual damages and compensatory damages the same thing?

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Mr. Tucker: That's what I am saying.

The Court: There are punitive damages—

Mr. Tucker: Maybe I have the hang-up on defining the terms.

The Court: There seems to be and I don't—it seems to be really my impression is a complete misunderstanding as to what the import of our standing pre-trial order here is, the statement of contested and uncontested facts. No one seems to be able to understand that, and I am sorry, but I think in the interest of justice, as we say, we will go ahead with the trial [7] the best we can.

(Attorney Robert D. Scott enters room.)

The Court: I mean, I don't know what you are talking about. There is no actual damages, there's no compensatory damages. I think you are here on punitive. My understanding of the file. Now, you tell me you are here on something else. So I think the only way to proceed, let's go and have the trial and either side can object if they want to and you can make your offer of proof for the record, if I don't rule in your favor.

What else can I do?

Mr. Pikofsky: I understand there's no need to go through all the testimony again that was taken on the preliminary.

The Court: As I see it, I don't—no one has told me, with due respect to counsel, of any fact that really hasn't already been made a matter of record, that is not in this transcript.

Mr. Dudek: Judge, I am disturbed over the comment to the Court at the preliminary time by the response as a matter of prejudice that anybody can claim they are not prejudiced and the Court has never seen a person who claimed he's prejudiced.

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The Court: If you want your man to say he's not prejudiced, I am willing to hear him say it.

【8】 Mr. Dudek: No, I am not saying that. I think there is something more to that, if the Court please.

The Court: Let's go on with the trial. You can argue that to me. You have a perfect right to argue anything you want to. I just think that a judge has to judge things by the facts, of what people do, and their acts and conduct, because no one is going to come into court and say I am prejudiced.

Mr. Dudek: The only point we are trying to say—

The Court: That is my personal view. It's not a statement of law, it's my personal view. And I don't know what you want me to do now. What do you want me to do? What is your request?

Mr. Dudek: I want to try my case. I want them to prove up their case. I am not asking they come in and be duplicitous and to go over matters that are already in the record which the Court is trying. But I am saying this, we have —when this matter was heard, we took it that it was not a trial on the merits, that this thing had to do with reference to the temporary restraining order and nothing more.

Now, if we can go ahead and shorten the trial and the Court's time with reference—

The Court: All they have to do is move all 【9】 the evidence taken at the hearing on the preliminary injunction be incorporated and it's automatic under the Federal Rule 65.

Mr. Dudek: We have no objection to that, Judge.

The Court: All right.

Mr. Dudek: Except we are saying we haven't tried this matter on discrimination.

The Court: If you have anything new to come forth, I will hear it. I am at your service.

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(The following proceedings were had in open court, commencing at 11:03 a.m.:)

The Deputy Clerk: Case No. 69-C-524, Julia Rodgers versus Leroy Loether, Mariane Loether and Mrs. Anthony Perez, before the Court at this time for trial.

Can I have the appearances, please.

Mr. Pikofsky: Appearng for the Plaintiff, Milwaukee Legal Services by Otto L. Tucker and Seymour Pikofsky and the Plaintiff, Mrs. Julia Rogers in person.

Mr. Dudek: Edward A. Dudek and Robert Scott representing Mr. and Mrs. Loether, and Mrs. Perez who are present in court.

The Court: We have had a hearing on motion for preliminary injunction. Under Rule 65, I will so order, that that be complied with, any evidence received, and I am reading from the rule now, upon application for [10] preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated at the trial.

And so everything that was received at that time will become part of this trial.

The parties have also subsequent to the time of the hearing on a preliminary injunction, I met with the parties several times, I believe, in pre-trial conference trying to resolve the differences here. It is my understanding that the Plaintiff no longer wishes to rent the apartment. It is also my understanding that Defendant is perfectly willing at this time, anyway, or was at one of those conferences to rent it to a Negro. And that the parties have entered into a statement of uncontested facts which was filed on June 15th, 1970. I don't know if it's—I don't think there are any facts that are here that really were not in the original hearing, but I want to know will the lawyers

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please get out in front of them that statement of uncontested facts. I want to know if there is any fact in there that they are incapable of stipulating to.

Mr. Pikofsky: Your Honor is referring to the statement of uncontested facts?

The Court: Yes. These matters are not contested.

【11】 Mr. Pikofsky: If Your Honor please, we are prepared to stipulate to all the statements contained in the statement of uncontested facts.

The Court: All right. How about Mr. Dudek?

Mr. Dudek: The same.

The Court: All right. The statement of uncontested facts, all the facts listed there will be received on stipulation.

All right. Now, Mr. Pikofsky, do you have anything further?

Mr. Pikofsky: Yes, Your Honor. Regarding the element of damages, we will call the Plaintiff Julia Rogers.

The Court: All right.

JULIA ANN ROGERS, called as a witness herein on her own behalf, being first duly sworn, was examined and testified as follows:

The Deputy Clerk: State your full name, and spell your last name for the record, please.

The Witness: Julia Ann Rogers, R-o-g-e-r-s.

Direct Examination by Mr. Pikofsky:

Q. Mrs. Rogers, would you state for the record, please, your name and address? A. Julia Ann Rogers, 2515 West Glendale Avenue.

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[17] ***

Q. You moved from the First Street address then? A. Right. I believe so. I am not sure of the date, but it was before Christmas. And it was either the first or the beginning of the second week. I can't remember exactly.

Q. Where did you move to at that time? A. I moved to 136 East Burleigh.

Q. Now, in making that move, what, if any, expenditures did you have?

Mr. Dudek: Objected to as being irrelevant and not in compliance with the Court's pre-trial order. Included as not only an order with reference to itemized—included in that pre-trial order is that we were to be furnished with an itemized statement of the damages that they claimed. We have not been furnished with any itemized statement.

Mr. Pikofsky: If Your Honor will bear with me for one moment, I believe in the deposition, in the adverse examination taken by Mr. Scott of the witness, taken on May 14, 1970, the witness in response to Mr. Scott's questions—

The Court: That is not the objection.

Mr. Pikofsky: —testified as to damages.

The Court: That is not the objection. I don't really know why it is so difficult—well, the standing [18] pre-trial order is designed to boil down all the discovery so we know what you men are really arguing about. Now, there is nothing in this file in compliance with the standing pre-trial order indicating what the actual damages were in this case. Now, there may be something tucked away somewhere in all the discovery, but there is nothing that has been

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submitted. I think the objection should be sustained. I will allow you to continue under Rule 43, make an offer of proof, whatever you wish to make. I want you to have a complete record so you may continue as an offer of proof in question and answer form.

Mr. Pikofsky: If Your Honor please, at this time—

The Court: You may continue as an offer of proof, or are you going to argue with me about it.

Mr. Pikofsky: No, I am not going to argue about it with Your Honor.

The Court: Go ahead.

Mr. Pikofsky: I plan to make the offer of proof at this time.

The Court: All right. Go ahead.

Mr. Pikofsky: If Your Honor please, Plaintiff at this time is prepared to prove that—

The Court: You can make it through question [19] and answer.

Mr. Pikofsky: All right, fine, thank you, Your Honor.

Could you read back the last question, please.

(Question read.)

The Witness: Actual moving costs, is that what you are asking me?

Mr. Pikofsky: Yes.

The Witness: Schmidt Movers moved me from the First Street address to the 136 address and it was \$100. \$55.00 of that was reimbursed to me by the Welfare Department.

Mr. Pikofsky:

Q. Was the other \$45.00 reimbursed? A. No.

* * * * *

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[205] * * *

The Court: All right. Well, this has been a long and tortuous lawsuit. The action was brought under Title VIII of the Civil Rights Act of 1968, 42 U.S. Code Section 3601-19 which prohibits discrimination in the rental of housing. The Plaintiff has claimed that she was discriminated against by the Defendants in that they refused to rent her an apartment because she was a Negro. The Plaintiff has requested injunctive relief restraining the rental of the apartment except to her, money damages for loss that she has sustained due to the alleged discrimination and punitive damages in the amount of \$1,000 and attorney's fees.

I granted the Plaintiff's motion for temporary restraining order on November 17th, 1969 following an extended hearing, entered a preliminary injunction temporarily restraining the rental of the apartment pending final determination of the Court. At that time, [206] of the preliminary hearing, I found there was probable cause to believe there was discrimination in this case and that she could probably establish that on a final hearing.

The Court had many conferences with the parties trying to work this out. But to no avail. And at one of those, on the hearing of April 30th, 1970, the Court with the consent of the Plaintiff dissolved the preliminary injunction because by that time the Plaintiff was no longer interested in the apartment. Therefore, the only issue remaining for this hearing today, yesterday and today, was for the claim—the final hearing on the question of

Transcript of Proceedings, October 26 and 27, 1970

discrimination and the claim for compensatory and punitive damages and attorney's fees.

It appears that on, from the evidence and the entire file and both hearings, October 30, 1969 an advertisement appeared in the Milwaukee Journal, a newspaper published in this city offering for rent this apartment which was located at 2529 North Fratney Street, Milwaukee, Wisconsin. And it appears that Plaintiff Julia Rogers is a black American and Miss Jacqueline Haessly is Caucasian, and the Defendants are at least white, I don't know if they are Caucasian, I never know what these things are, but they are white. At the time the ad appeared in the paper, Mrs. Rogers was hospitalized [207] at St. Mary's Hospital here in Milwaukee. The ad was seen by her friend, Miss Haessly, who called the number given and spoke to the Defendant Mrs. Perez. She asked Mrs. Perez if it would be possible to see the apartment and Mrs. Perez told her she could come over if she could get there by 5:00 p.m. of that day. Miss Haessly went to see the apartment, arriving there at 4:30 p.m. on October 30th, 1969. Mrs. Perez is a cousin of Mrs. Loether and Mrs. Perez took Miss Haessly to see the upstairs apartment. Miss Haessly told Mrs. Perez that she was looking for a place for a friend of hers who was in the hospital. Mrs. Perez stated that Mr. and Mrs. Loether were coming over that evening, that they would have to make the decision as to whether or not Miss Haessly could have the apartment for Mrs. Rogers. Miss Haessly stated that she was very interested in obtaining the apartment and asked Mrs. Perez if she, that is Mrs. Haessly, should offer a deposit, and would the deposit be accepted. Mrs. Perez told Miss Haessly that she would call Mrs. Loether and Mrs. Loether was in fact called and

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Miss Haessly spoke to Mrs. Loether and to find out whether or not a deposit would be accepted.

It appears that in that conversation, Mrs. Loether asked various questions about Mrs. Rogers, such as where she was hospitalized, how many children in the [208] family, marital status and financial status, but in any event, did not ask about race, and Mrs. Loether then asked to speak to Mrs. Perez and Mrs. Perez as a result of these conversations was authorized by Mrs. Loether to accept a deposit and to give a receipt. At least she did accept a deposit and she did give a receipt.

And up until that time, there was no problem. I think up until that time, there is no question in my mind, that the apartment was rented, at least effectively rented. Then Mrs. Loether requested Mrs. Haessly and was given the hospital room number and she talked to Mrs. Rogers and then she called Mrs. Rogers at the hospital and discussed the rental of the apartment at which time Mrs. Rogers advised Mrs. Loether that she, Mrs. Rogers, was a black person. Then for the first time the question of race came up and Mrs. Loether became concerned about the race of the prospective tenant and, as I see it, the rental of the apartment was revoked at that stage and it was revoked because of race, at which time Miss Haessly came back into the picture and made it clear to Mrs. Loether that that was against the law, she could not do that. And the testimony indicates it was about this time that Mr. Loether came in and also learned that he was told that he had to rent this apartment to someone that he didn't want to rent it to, and that he believed that no one is going to tell him

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what to do. Well, that is a difficult question. I think that the law does tell him what to do. And he may find that very difficult to accept. But it is the law nevertheless. The deal was closed, it was effectively closed. Mrs. Perez in effect became the agent of these people to rent the apartment. She rented the apartment and then the deal, after it was closed, when race was mentioned, it was revoked and then I think that the acts of Miss Haessly in telling them—I am not saying she didn't have a right to do this, but I think her act of telling the Loethers that they had to rent it probably hardened their position. In short, I think but for the race of Mrs. Rogers, she would have had the apartment, because that was the only question these people were talking about from that time on. They haven't discussed anything else really.

I don't believe it's necessary for me to go into all the details—well, I might as well. In any event, Mrs. Loether who then actually went to see Mrs. Rogers at the hospital, to see if they could work out something, but it turned out that that could not be worked out.

I am also mindful of the fact that Mr. Loether, being a little stubborn about this, and I do not look [210] upon the Loethers certainly as the worst and most bigotted people I have come in contact with in this world, and that is what makes this case more difficult than some. Now, we get to the questions—although I am satisfied that there is only one conclusion I can reach and that is the apartment was not rented because of the race of Mrs. Rogers and therefore it's a violation of the Federal law.

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Now, we come to the questions of damages. The Loethers have indicated or did indicate they were willing to rent this to a black person but they consistently maintained the position they were not willing to rent it to Mrs. Rogers, and therefore I think that that—here we are interested in Mrs. Rogers' rights, but I recognize the property was vacant for an extended period of time and the Loethers have been subjected to a lot of expenses. I do not believe there have been any compensatory damages proven in this case or out-of-pocket expenses of that nature, but I do think that an award of \$250 in punitive damages will be in order. It probably takes the wisdom of a Solomon to decide these cases fairly, but that is the best I can do. And I think under all the circumstances, I am not going to award—I know Milwaukee Legal Services is very interested in establishing the position that they should [211] be entitled to attorney's fees in these matters and maybe they should in the proper case, but considering everything in this case, I am just not going to award any attorney's fees and costs.

Thank you, gentlemen.

Mr. Tucker: If Your Honor please,—

The Court: You may draft an order in accordance with this opinion.

Mr. Tucker: I was wondering about the costs. You are not awarding costs?

The Court: No.

Mr. Tucker: Very well, sir.

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Judgment of District Court

December 7, 1970

This action came on for trial before the Court, Honorable John W. Reynolds, United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is ORDERED AND ADJUDGED that the plaintiff, Julia Rogers, recover of the defendants, LeRoy Loether, Mariane Loether and Mrs. Anthony Perez \$250.00 as punitive damages; further ordered, that compensatory-actual damages, costs and attorney's fees are hereby denied.

Opinion of Court of Appeals

In the
United States Court of Appeals
for the Seventh Circuit.

SEPTEMBER TERM, 1971

JANUARY SESSION, 1972

No. 71-1145

JULIA ROGERS,

Plaintiff-Appellee,

v.

LEBOY LOETHER and MARIANE
LOETHER, his wife and Mrs.
ANTHONY PEREZ,

Defendants-Appellants.

Appeal from the
United States District Court for the
Eastern District of
Wisconsin.

No. 69-C-524

JOHN W. REYNOLDS,
Judge.

ARGUED FEBRUARY 22, 1972 — DECIDED SEPTEMBER 29, 1972

Before SWIGERT, Chief Judge, STEVENS, Circuit Judge,
and CAMPBELL, District Judge.*STEVENS, Circuit Judge. The question presented is whether appellant was entitled to a jury trial in an action for compensatory and punitive damages brought under § 812 of the Civil Rights Act of 1968, 42 U.S.C. § 3612.¹

In her complaint, plaintiff alleged that the three defendants had refused to rent her an apartment because of

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

¹ Section 812 provides, in part:

"(a) The rights granted by sections 803, 804, 805, and 806 may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action

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her race.² She requested injunctive relief restraining defendants from renting the apartment to anyone else, money damages for her actual losses, punitive damages of \$1,000, and attorney's fees.

The district court, after an extended hearing, entered a preliminary injunction. Subsequently, with plaintiff's consent, the injunction was dissolved; thereafter only plaintiff's claims for compensatory and punitive damages and attorney's fees remained. Defendants' request for a jury trial of those issues was denied. After trial, the court found that plaintiff had suffered no actual damages but assessed punitive damages of \$250; the prayer for attorney's fees was denied.

On appeal defendants contend that the finding of discrimination is clearly erroneous, that it was error to award punitive damages, and that they were entitled to a jury trial. We shall not describe the evidence of discrimination except to note that it was marginal; whichever way the trial judge had ruled, his determination of that issue would not have been clearly erroneous.³ We are also

¹ (Continued)

shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred:

"(c) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than \$1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: Provided, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees." 82 Stat. 88, 42 U.S.C. § 3612.

² Section 804 of the 1968 act provides, in part:

"As made applicable by section 803 and except as exempted by sections 803(b) and 807, it shall be unlawful—

"(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin." 82 Stat. 83, 42 U.S.C. § 3604.

³ Defendants contend that their refusal was motivated by the obnoxious behavior of a white social worker who was helping the plaintiff find an apartment; they had offered to rent the apartment to any black tenant other than the plaintiff and offered considerable evidence of absence of racial prejudice by either themselves or other tenants in the apartment. On the other hand, plaintiff's evidence tended to indicate that negotiations proceeded smoothly until defendants learned that plaintiff was a Negro.

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satisfied that if his finding of discrimination is accepted, an award of punitive damages was authorized by the statute notwithstanding the absence of any actual loss to the plaintiff.⁴ We shall confine our analysis to the jury trial issue.

The district court held that a jury trial was not required by the Seventh Amendment⁵ or by a fair interpretation of the statute.⁶

The court rejected the constitutional claim on the grounds (1) that the cause of action was created by statute and not recognized at common law; and (2) that the statutory claim invoked the equitable powers of the court and the amendment has no application to the recovery of money damages as an incident to complete equitable relief. Both propositions are supported by *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49.⁷

The district court also considered the award of damages in a housing discrimination case arising under the 1968 Act analogous to an award of back pay in an employment discrimination case under the Civil Rights Act of 1964 and therefore relied on cases holding that there is no right to a jury trial in such litigation.⁸ In its opinion the district court placed no reliance on the argument, sometimes advanced by proponents of civil rights legislation, that all

⁴ As we read the statute it does not require a finding of actual damages as a condition to the award of punitive damages. In any event, in other litigation the federal courts have held that punitive damages may be awarded without requiring an award of compensatory damages. See, e.g., *Wardman-Justice Motors, Inc. v. Petrie*, 39 F.2d 512, 516 (D.C. Cir. 1930); *Basista v. Weir*, 340 F.2d 74, 85-86 (3rd Cir. 1965). The Basista case involved a suit against policemen for punitive damages under the Civil Rights Act of 1871, 42 U.S.C. § 1983.

⁵ "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." United States Constitution, Amendment VII.

⁶ The opinion is reported at 312 F. Supp. 1682.

⁷ The district court also cited *United States v. Louisiana*, which holds that the Seventh Amendment is "applicable only to actions at law." 330 U.S. 668, 705.

⁸ *Hayes v. Seaboard Coast Line R.R.*, 48 F.R.D. 49 (S.D. Ga. 1970); *Chestwood v. South Central Bell Tel. & Tel. Co.*, 303 F. Supp. 754 (M.D. Ala. 1968).

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lowance of a jury trial might undermine effective enforcement of the statute.⁹

Our study of the issue persuades us that (1) the constitutional right to trial by jury applies in at least some judicial proceedings to enforce rights created by statute; (2) this action for damages is "in the nature of a suit at common law";¹⁰ (3) the nature of the claim is "legal" within the test identified in *Ross v. Bernhard*, 396 U.S. 531, 538; (4) the right to a jury trial may not be denied on the ground that the damage claim is incidental to a claim for equitable relief; (5) cases involving an award of back pay pursuant to the 1964 Act are inapplicable; and finally (6) in view of our grave doubts as to the constitutionality of a denial of the right to a jury trial and the failure of Congress expressly to indicate that the traditional procedure for litigating damage claims should not be followed, the statute should be construed to authorize trial by jury. Accordingly, we have decided to reverse.

I.

The Seventh Amendment preserves the substance of the right to a jury trial which existed under English common law when the amendment was adopted.¹¹ It has never been suggested that the application of the amendment is narrowly confined to such common law writs as might be enforceable in a federal court. On the contrary, since the bulk of the civil litigation in the federal judicial system involves the assertion of a federal right derived either from an act of Congress or the Constitution itself, necessarily the principal significance of the Seventh Amend-

⁹ See, e.g., mention of such factors in Note, *Jones v. Mayer: The Thirteenth Amendment and the Federal Anti-Discrimination Laws*, 69 Colum. L. Rev. 1019, 1051; Comment, *The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964*, 37 U. Chi. L. Rev. 167; *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1264. Among the cases, see *Hayes v. Seaboard Coast Line R.R.*, 46 F.R.D. 48, 53 (S.D. Ga. 1970); *Lawton v. Nightingale*, ..., F. Supp. ..., 41 U.S.L.W. 2041 (D.C. Ohio, June 27, 1972).

¹⁰ See *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. at 48.

¹¹ *Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657.

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ment has been in such cases.¹² It is perfectly clear that the fact that a litigant is asserting a statutory right does not deprive him or his adversary of the protection of the amendment.

In *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, Mr. Justice Story, writing for the Court, rejected the contention expressed by Mr. Justice M'Lean in dissent that the amendment was inapplicable because the claim arose not under the common law but rather under the statutes of Louisiana.¹³ Mr. Justice Story focused on the character of the claim as a "legal right" and eloquently described the purpose of the amendment:

"The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into, and secured in every state constitution in the union; and it is found in the constitution of Louisiana. One of the strongest objections originally taken against the constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by Congress; and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people. This amendment declares, that 'In suits at common law, where the value in controversy shall

¹² "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment." *Jacob v. New York City*, 315 U.S. 752.

¹³ "It is not strictly a common law proceeding; but a proceeding under the peculiar system of Louisiana;

"In the state of Louisiana, the principles of common law are not recognized; neither do the principles of the civil law of Rome furnish the basis of their jurisprudence. They have a system peculiar to themselves, adopted by their statutes, which embodies much of the civil law, some of the principles of the common law, and, in a few instances, the statutory provisions of other states. This system may be called the civil law of Louisiana, and is peculiar to that state." 28 U.S. at 449-450 (Mr. Justice M'Lean dissenting).

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exceed twenty dollars, the right of trial by jury shall be preserved; and no fact once tried by a jury shall be otherwise re-examinable in any Court of the United States, than according to the rules of the common law.' At this time there were no states in the union, the basis of whose jurisprudence was not essentially that of the common law in its widest meaning; and probably no states were contemplated, in which it would not exist. The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. . . . By common law, they meant what the constitution denominated in the third article 'law'; not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those, where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity was often found in the same suit. Probably there were few, if any, states in the union, in which some new legal remedies differing from the old common law forms were not in use; but in which, however, the trial by jury intervened, and the general regulations in other respects were according to the course of the common law. Proceedings in cases of partition, and of foreign and domestic attachment, might be cited as examples variously adopted and modified. In a just sense, the amendment then may well be construed to embrace all suits, which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." 28 U.S. at 445-446.

In an unbroken line of cases involving enforcement of statutory rights, the Supreme Court has treated the right to a jury trial as a matter too obvious to be doubted. Thus, in a civil action to recover a statutory penalty for a violation of the immigration laws, the first Mr. Justice Harlan, speaking for the Court, said that the "defendant was, of course, entitled to have a jury summoned in this case." *Hepner v. United States*, 213 U.S. 103, 115. In an action for treble damages under § 7 of the Sherman Act,

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Mr. Justice Holmes, also speaking for a unanimous Court, considered it plain that "the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law." *Fleitmann v. Welsbach Co.*, 240 U.S. 27, 29. In a case alleging violation of the Safety Appliance Act of 1910, which did not expressly authorize a private remedy, the Court found an implied right to recover damages in a jury trial "according to a doctrine of the common law." *Texas & Pacific Ry. v. Rigsby*, 241 U.S. 33, 39. In a case involving an ambiguous claim for damages, either as an amount due under a contract or as a statutory claim for damages for trademark infringement, the Court held that the claim was "wholly legal in its nature however the complaint is construed" and that the "constitutional right to trial by jury" was applicable to the claim. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 477. And in an action brought under § 4 of the Clayton Act, the Court has expressly characterized the right to a jury trial as "constitutional." *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510.¹⁴

N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49, does not hold—as is sometimes assumed—that no jury trial is required in a cause of action created by statute since any such action would have been unknown to the common law and therefore beyond the reach of the Seventh Amendment. The *Jones & Laughlin* opinion expressly recognizes that the amendment is applicable not only to a suit at common law, but also to a judicial proceeding "in the nature of such a suit." The distinction drawn in the opinion is not between substantive rights derived from the common law, as opposed to those created by statute;

¹⁴ "Since the right to a jury trial is a constitutional one, however, while no similar requirement protects trial by the court, that discretion is very narrowly limited and must, wherever possible, be exercised to preserve jury trial." *Id.* at 510.

It is of interest that in the elaborate argument presented to us in *Dasho v. Susquehanna Corp.*, 461 F.2d 11 (7th Cir. 1972), cert. denied, U.S. ___, 40 U.S.L.W. 3617 (June 26, 1972), in which the decision turned on the constitutional right to a jury trial in an action asserting rights under § 10(b) of the Securities Act of 1934, none of the defendants even suggested that the statutory source of plaintiffs' claim affected their right to demand a jury.

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it is the difference between a proceeding "in the nature of a suit at common law" and a "statutory proceeding."¹³

The Court's reference to a "statutory proceeding" rather than to a judicial proceeding brought to redress a right created by statute is important. Cases such as *Parsons v. Bedford* and *Fleitmann v. Welsbach Co.* were such judicial proceedings, and their teaching is not undermined in the slightest by the *Jones & Laughlin* holding. The procedure approved by *Jones & Laughlin* was, of course, fundamentally different from a common law trial. It was administrative rather than judicial and did not invoke the original jurisdiction of a court in determining factual issues or fashioning a remedy. The initial case was not "tried" in a court of law or equity; it was "tried" in a separate proceeding created by statute.¹⁴

¹³ The Court's entire discussion of the Seventh Amendment issue occupies less than one page of a 27-page opinion. That page includes the Court's discussion of both the historic view that no jury is required if the recovery of damages is an incident to equitable relief (a proposition discussed in part IV of this opinion) and to the statutory proceeding point. The Court said:

"The Amendment thus preserves the right which existed under the common law when the Amendment was adopted. *Shields v. Thomas*, 18 How. 253, 262; *In re Wood*, 210 U. S. 246, 258; *Dimick v. Schiedt*, 293 U. S. 474, 476; *Baltimore & Carolina Line v. Redman*, 295 U. S. 654, 657. Thus it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law. *Clark v. Wooster*, 119 U. S. 322, 325; *Pease v. Rathbun-Jones Engineering Co.*, 243 U. S. 273, 279. It does not apply where the proceeding is not in the nature of a suit at common law. *Guthrie National Bank v. Guthrie*, 173 U. S. 528, 537.

"The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit." 301 U. S. at 48-49. (Emphasis added.)

¹⁴ That this is what the Court meant when it referred to a "proceeding . . . not in the nature of a suit at common law" (emphasis added) is clear from the case which it cites to support the statement, *Guthrie National Bank v. Guthrie*, 173 U. S. 528. In that case a territorial legislature set up a special commission that did not include a jury to hear certain claims against a municipality. The claims had no legal force, but the legislature thought it equitable to provide for their payment in appropriate cases. While a court became involved in approving or disapproving the recommendations of the commission, it is clear that the proceeding, and not merely the right to relief, was statutory. See *Developments, supra* note 9, 84 Harv. L. Rev. at 1266-1268.

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Here there is no statutory proceeding. The statute authorizes a "civil action" in the courts of the United States. The rights protected and the relief available are set forth in the statute, but the proceeding is not statutory in the *Jones & Laughlin* or *Guthrie*¹⁷ sense.¹⁸ The issue we must consider, therefore, is whether an action for damages authorized by the Civil Rights Act of 1968 is, in the language of *Jones & Laughlin*, "in the nature of a suit at common law."

II.

There are three reasons why this action is the kind of case which is appropriately described as in the nature of a suit at common law.

First, the tribunal whose jurisdiction is invoked is a court created pursuant to Article III of the Constitution. Unquestionably, congressional power to prescribe the procedures to be employed in such a court is limited by the Constitution and specifically by the Seventh Amendment.¹⁹ The proceeding is judicial in character rather than administrative or "statutory." In all respects—at least all except the right to a jury trial if our appraisal of that right is not correct—it is clear that the procedure to be

¹⁷ See note 16, *supra*.

¹⁸ In making a similar analysis of *Jones & Laughlin* in the context of a damage remedy for employment discrimination under Title VII of the Civil Rights Act of 1964, one commentator drew this conclusion:

"The Court there held that a jury trial was not required in a 'statutory proceeding'; its concern was to protect the comprehensive administrative scheme of the NLRB, which would have been substantially destroyed if jury trials were required. The relevant distinction thus appears to be between those statutory actions which invoke an administrative process and those which do not. If the Congress makes a judgment that a comprehensive scheme of administrative adjudication is required, the Court will be willing to find that it is a 'statutory proceeding' to which the seventh amendment has no application. If, however, a statutory claim is entrusted to court decision, where there is no functional justification for not granting a jury trial, and the claim is for the type of relief normally awarded by a court of law, as would be the case in an action for compensatory damages under Title VII, the similarity to common law forms of action will require a jury trial." Developments, *supra*, note 9, 84 Harv. L. Rev. at 1267-1268.

¹⁹ In *Minneapolis & St. Louis R.R. v. Bombolis* the Court expressly noted that "the Seventh Amendment is controlling upon Congress." 241 U.S. 211, 219.

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followed in this case is precisely that which is applicable to suits at common law which are tried in the federal judicial system.

Second, the remedy sought, including both compensatory and punitive damages, is the relief most typical of an action at law. If, as the scholars have consistently indicated, we should look to history for guidance in determining whether or not a claim is of the kind which is triable to a jury,²⁰ unquestionably, the prayer for damages points to that result.²¹

Finally, the nature of the substantive right asserted, although not specifically recognized at common law, is analogous to common law rights. An English innkeeper who refused, without justification, to rent lodgings to a traveler was apparently liable in an action at law triable to a jury.²² Refusing to rent an apartment on the false ground

²⁰ The proposition that we should look to history for guidance is well settled. See 5 Moore's Federal Practice ¶ 38.11 [7]; 9 Wright and Miller, Federal Practice and Procedure, Civil § 2302; James, Civil Procedure § 8.1 at p. 338 (1965). Even the dissenters in *Ross v. Bernhard* agreed, 396 U.S. 531, 543 n.1.

²¹ Damages, of course, were traditionally awarded in legal actions to compensate a plaintiff for a breach of a legal duty owed him by defendant. That duty may be prescribed by the common law (e.g., the tort law of negligence), by contract or by statute. The origin of the duty does not necessarily determine the nature of the suit. In *Texas & Pacific Ry. v. Rigby*, 241 U.S. 33, for example, the Court found an implied remedy for damages for violation of the duty placed upon defendant by the Safety Appliance Act. The case was tried to a jury.

In concluding that a jury trial was required in a suit seeking damages under the Labor-Management Reporting and Disclosure Act of 1959, the Fourth Circuit said in part:

"The right asserted is indeed one created by statute, but we do not agree that a jury trial is necessarily unavailable because the suit for damages is one to vindicate a statutory right. There is no such cleavage between rights existing under common law and rights established by enacted law, where the relief sought is an award of damages." *Simmons v. Avisco, Local 713, Textile Workers Union*, 350 F. 2d 1012, 1018 (1965).

²² "Thus innkeepers, who have nowhere been described as public utilities, have from early times been subject to the obligation to receive and afford proper entertainment to every one who offers himself as a guest, if there be sufficient room for him in the inn, and no good reason for refusing him." *Davies Warehouse Co. v. Brown*, 137 F.2d 201, 207 (Emerg. Ct. App. 1943), and cases there cited. *Davies* was reversed on other grounds, 321 U.S. 144.

See also *Thomas v. Pick Hotels Corp.*, 224 F.2d 664, 666 (10th Cir. 1955) (common law action against innkeeper for discrimination sounds in tort); 43 C.J.S. Innkeepers, § 9 at p. 1149.

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that an applicant is an unfit tenant, when race is the real motivation is a species of defamation; libel and slander, of course, are common law causes of action. Discrimination might involve mental distress or other emotional harm, and the developing common law of torts recognizes a cause of action for the intentional infliction of emotional harm.²³ We thus conclude that a suit for damages for discrimination in the sale or rental of housing facilities is sufficiently analogous to a suit at common law to be appropriately characterized as a "legal" claim triable to a jury.

III.

Although the full implications of the Supreme Court's decision in *Ross v. Bernhard*, 396 U.S. 531, have yet to be determined, it is clear that mere analogy to history may not be sufficient to define the scope of the Seventh Amendment. In that case the constitutional right to a jury trial was held to encompass at least some claims in litigation which historically had been the exclusive province of equity. That was a derivative action brought by a shareholder in the name of a corporation. The shareholder's standing to litigate was governed by equitable principles; the corporate claim which he asserted was, at least in part, legal.²⁴

²³ At common law, an innkeeper was liable in damages for insulting or abusing his guests or indulging in any conduct resulting in unnecessary physical discomfort or distress of mind. See *Odom v. East Avenue Corp.*, 178 Misc. 363, 34 N.Y.S. 2d 312 (1942), affirmed, 37 N.Y.S. 2d 491, 264 App. Div. 985 (complaint seeking damages against innkeeper for failure to serve guest in hotel restaurant because of race states common law cause of action). Professors Gregory and Kalven have suggested that the logic of the common law development of the dignitary tort might well apply in cases of racial discrimination. Gregory & Kalven, *Cases and Materials on Torts* 961 (2d ed. 1969). In addition, a racial discrimination suit might also be considered analogous to the so-called "new tort" for extreme and outrageous conduct which results in emotional harm. As to this "new tort," see *Eckenrode v. Life of America Ins. Co.*, ... F.2d ... (7th Cir. Aug. 3, 1972, No. 71-1103).

²⁴ "In the instant case we have no doubt that the corporation's claim is, at least, in part, a legal one. The relief sought is money damages. There are allegations in the complaint of a breach of fiduciary duty, but there are also allegations of ordinary breach of contract and gross negligence. The corporation, had it sued on its own behalf, would have been entitled to a jury's determination, at a minimum, of its damages against its broker under the brokerage contract and of its rights against its own directors because of their negligence. Under these circumstances it is unnecessary to decide

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History was unquestionably relevant to the Court's analysis of the question whether a jury trial was required in such a case. But, following the lead set in *Beacon* and *Dairy Queen*, the traditional treatment of the entire litigation was subordinated to the traditional characterization of particular claims. Thus, the Court had "no doubt" that a claim for money damages predicated on breach of contract or gross negligence was legal in character.

This conclusion did not rest, as it might, simply on the fact that such a claim was enforceable at common law in England in 1791. Instead, the Court identified history as only one of three criteria that should be considered in determining the "legal" nature of an issue. The other two were: "second, the remedy sought; and, third, the practical abilities and limitations of juries."²⁴ Indeed, not only did the Court identify these two additional criteria; it also implied, without expressly stating, that history may be a less reliable guide than the other two.²⁵ We have already concluded that under an historical analysis a jury trial is required in the present case; we proceed to consider the other two criteria.

Under the second and third criteria identified in *Ross v. Bernhard*, the civil rights claim asserted in this case was certainly appropriate for determination by a jury. The relief sought was actual damages and punitive damages. Both the determination of the amount which would adequately compensate a litigant for an unliquidated claim and the punitive element of the award are appropriate for jury determination. As we have already discussed, juries historically have been required where the remedy sought was damages, either compensatory or punitive.

²⁴ (Continued)

whether the corporation's other claims are also properly triable to a jury. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962)." 396 U.S. 531, 542-543.

²⁵ "As our cases indicate, the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply." 396 U.S. at 538 note 10. (Emphasis added.)

²⁶ In the preceding footnote we have emphasized the language which so implies.

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The "practical abilities and limitations of juries" obviously present no obstacle to their determination of the issues presented in these civil rights cases. Typically, the facts are not complex and decision turns on appraisals of credibility and motive. Certainly such matters are far more suitable for jury determination than complicated commercial issues that routinely arise in derivative and antitrust litigation. Thus, the third as well as the second criterion identified in *Ross v. Bernhard* strongly militates in favor of recognition of the right to a jury trial in a case of this kind.

History indicates that a jury trial is required. And if the Supreme Court adheres to its identification of two additional criteria in *Ross v. Bernhard*, both the damage relief sought and the character of the issue to be tried compel the conclusion that the litigants are entitled to a jury.

IV.

The *Jones & Laughlin* holding that the Seventh Amendment is inapplicable to an N.L.R.B. proceeding terminating in the entry of an order directing reinstatement and awarding back pay was supported not only by the Court's characterization of the proceeding as statutory, but also by reference to chancery practice in which damages could be awarded as an element of complete equitable relief.²⁷ In this case the district court also regarded the relief authorized by the 1968 Act as primarily equitable and considered it appropriate to award damages as incident to such relief.

As the case developed, the defendant's right to demand a jury was not determined until after plaintiff's claim for equitable relief had been abandoned. Nevertheless, we share the district court's view that the right to a jury trial in this kind of case may properly be tested by the character of the relief requested in plaintiff's complaint. Our decision is not predicated on the special circumstance that only the damage claims remained when defendant's demand for a jury was denied.

²⁷ See quotation from the Court's opinion in footnote 15, *supra*.

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At common law, a court of equity, in a proceeding properly before it, would hear and determine any legal issues incidental to the equitable issues and award any legal relief which might be incidental to equitable relief.²⁸ Multiplicity of suits could thus be avoided. And if equitable relief were no longer appropriate, the chancellor might nevertheless award damages or, in his discretion, permit the complaint to be amended to state only a legal claim which would then be triable to a jury.²⁹

Today, however, legal and equitable issues can both be raised in one "civil action" under the Federal Rules. Thus, the avoidance of a multiplicity of suits and the desire to afford a complete remedy in one proceeding are no longer justifications for the "incidental" power of an equity court to award money damages. The right of the court, without a jury, to award "incidental" legal relief was nevertheless thought secure under the Federal Rules until the Supreme Court indicated differently in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469.

In *Beacon*, the Court upheld the petitioner's right to a jury trial of his counterclaim for treble damages under the antitrust laws which he had asserted in response to a complaint seeking, in part, equitable relief. In *Dairy Queen*, plaintiff sought injunctive relief against use of a trademark and an accounting to determine the amount due under a contract deemed breached. The district court held that the proceeding was either "purely equitable" or that any legal issues were "incidental" to the equitable issues. Mr. Justice Black, speaking for the Court, disposed of the "incidental" issue quite bluntly: "[N]o such rule may be applied in the federal courts."³⁰ Referring to *Beacon*, he wrote:

²⁸ For purposes of our discussion of this "incidental to equitable relief" issue, we will assume, without deciding, that compensatory damages comparable to those sought herein might have been recovered in an 18th century chancery proceeding in which equitable relief appropriate when the suit was filed later became inappropriate.

²⁹ See generally 5 *Moore's Federal Practice*, ¶ 38.19[2]; 9 *Wright & Miller, Federal Practice and Procedure, Civil* § 2308, at pp. 42-43.

³⁰ 369 U.S. at 470. The complete sentence was:

"At the outset, we may dispose of one of the grounds upon which the trial court acted in striking the demand for trial by jury—based upon the view that the right to trial by jury may be lost

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"The holding in *Beacon Theatres* was that where both legal and equitable issues are presented in a single case, 'only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.' That holding, of course, applies whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not. Consequently, in a case such as this where there cannot even be a contention of such 'imperative circumstances,' *Beacon Theatres* requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury. There being no question of the timeliness or correctness of the demand involved here, the sole question which we must decide is whether the action now pending before the District Court contains legal issues."³¹

It would appear that *Beacon* and *Dairy Queen* have mandated that once any claim for money damages is made, the legal issue—whether defendant breached a duty owed plaintiff for which defendant is liable in damages—must be tried to a jury whether or not there exists an equitable claim to which the damage claim might once have been

³⁰ (Continued)

as to legal issues where those issues are characterized as 'incidental' to equitable issues—for our previous decisions make it plain that no such rule may be applied in the federal courts." *Ibid.*

³¹ *Id.* at 472-473. Preceding the quotation in the text, the Court wrote: ". . . Rule 38(a) expressly reaffirms that constitutional principle, declaring: 'The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.' Nonetheless, after the adoption of the Federal Rules, attempts were made indirectly to undercut that right by having federal courts in which cases involving both legal and equitable claims were filed decide the equitable claim first. The result of this procedure in those cases in which it was followed was that any issue common to both the legal and equitable claims was finally determined by the court and the party seeking trial by jury on the legal claim was deprived of that right as to these common issues. This procedure finally came before us in *Beacon Theatres, Inc. v. Westover*, . . ." *Id.* at 472.

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considered "incidental."²² We therefore conclude that the right to a jury trial of a claim for damages under the Civil Rights Act of 1968 may not be denied on the ground that such damages are merely incidental to the prayer for injunctive relief.²³

V.

Since the district court relied on several cases²⁴ holding

²² "Since the decision of the Supreme Court in *Beacon Theatres, Inc. v. Westover*, and *Dairy Queen, Inc. v. Wood*, it is clear that there is a right to a jury trial on an issue of damages, whether they are pleaded independently, or as an incident to a request for an injunction." 5 Moore's Federal Practice ¶ 38.34[1] at p. 1904. See also ¶ 39.19[2] at p. 172.1.

There is an equitable remedy of restitution which would not, of course, be eliminated by these decisions. In *Porter v. Warner Holding Co.*, 328 U.S. 385, the Court recognized that in the government's suit for an injunction to enforce the Emergency Price Control Act of 1942, the government might recover overcharges as restitution. The Court thought the equitable remedy of restitution appropriate—even though not specified in the statute—because it was incidental to other equitable relief and because its use would be appropriate to the enforcement of the statute. But these were justifications for the awarding of relief concededly equitable. The statute also permitted a private suit for damages and a government suit for damages (in the nature of penalties as the Court described them); in either case the damages might be trebled. The Court noted that restitution "differs greatly from the damages and penalties which may be awarded." *Id.* at 402. These remedies were expressly identified as legal in nature, and hence a jury trial would have been required.

²³ It seems quite clear that the punitive damages in this case cannot be considered "incidental" to equitable relief. See note 44, *infra*. See also *Porter v. Warner Holding Co.*, 328 U.S. 385, in which the Supreme Court viewed the government's right to sue for damages under the Emergency Price Control Act of 1942 as an action at law for "penalties." *Id.* at 401-402. See also *United States v. Jepson*, 90 F. Supp. 963 (D.N.J. 1950). But cf. *United States v. Shaughnessy*, 86 F. Supp. 175 (D. Mass. 1949). The Shaughnessy court held that the government could recover statutory penalties along with an injunction under the Housing and Rent Act of 1947. One basis for the decision, that the damages could be considered "incidental" to equitable relief, is now obsolete in view of *Beacon* and *Dairy Queen*. The other basis was that the "damages sought are in the nature of a penalty when sued for by the United States, and this right to sue exists only where the tenant himself has failed to bring his action. It is essentially what would be an old action in equity and as such, is triable before a court without a jury." *Ibid.* Professor Moore is critical of this decision. 5 Moore's Federal Practice ¶ 38.37[1] at 307. The court failed to mention either the Supreme Court's decision in *Porter* or the general proposition that equity will not avoid damages penal in character. To the extent that it may have viewed the suit as one in equity because the government stood in the shoes of the individual tenant, *Ross v. Bernhard*, 386 U.S. 531 (discussed in the text, *supra*), has clearly eliminated that basis for denying a jury trial.

²⁴ See note 8, *supra*. See also *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969); *Harkless v. Sweeny Independent*

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that in an employee's suit for reinstatement and back pay under Title VII of the Civil Rights Act of 1964, the employer is not entitled to a jury trial, we should briefly indicate why we think the reasoning of those cases is inapplicable here.

First, insofar as the cases hold that back pay is a legal remedy which may be recovered as incidental to equitable relief, we believe they cannot stand in the face of *Beacon* and *Dairy Queen*.

Second, to the extent that they hold, relying on *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49, that a jury trial is not required because the right vindicated is a statutory right, we reject the conclusion because it fails to differentiate between a statutory proceeding and the enforcement of a statutory right in an ordinary "civil action" in the courts.

Third, an acceptable rationale for awarding back pay in a non-jury judicial proceeding is consistent with our analysis of the damage claims asserted in this case. It is not unreasonable to regard an award of back pay as an appropriate exercise of a chancellor's power to require restitution.³⁴ Restitution is clearly an equitable remedy. As Professor Moore put it:

"In equity, restitution is usually thought of as a remedy by which defendant is made to disgorge ill-gotten gains or to restore the status quo, or to accomplish both objectives."³⁵

The retention of "wages" which would have been paid but for the statutory violation (of improper discharge) might well be considered "ill-gotten gains"; ultimate pay-

³⁴ (Continued)

School District, 427 F.2d 319, 324 (5th Cir. 1970), cert. denied, 400 U.S. 991 (no jury trial for back pay claim under 42 U.S.C. § 1983); *Culpepper v. Reynolds Metals Co.*, 296 F.Supp. 1232, 1239-1243 (N.D. Ga. 1968), reversed on other grounds, 421 F.2d 888 (5th Cir. 1970). Cf. *Ochoa v. American Oil Co.*, 338 F.Supp. 914 (S.D. Tex. 1972) (court writes in depth opinion contrary to these prevailing cases but follows circuit precedent in denying jury trial).

³⁵ This reasoning is applicable to 42 U.S.C. § 1983 as well since that statute authorizes not only "an action at law" but also a "suit in equity."

³⁶ 5 Moore's Federal Practice ¶ 38.24[2] at p. 1905.

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ment restores the situation to that which would have existed had the statute not been violated.³⁷

The payment of compensatory damages in a housing discrimination case, however, is not a return to plaintiff of something which defendant illegally obtained or retained; it is a payment in money for those losses—tangible and intangible—which plaintiff has suffered by reason of a breach of duty by defendant. Such damages, as opposed to rent overcharges,³⁸ unpaid overtime wages,³⁹ or back pay, cannot properly be termed restitution.⁴⁰

³⁷ Similarly, rent overcharges might be termed "ill-gotten gains." *Porter v. Warner Holding Co.*, 328 U.S. 395, discussed in note 32, *supra*. Attempts have been made to distinguish private actions and actions intended to correct an offense against the public interest, with the conclusion that a jury trial need not be afforded in the latter situation. In addition to the analytic difficulty with this public-private distinction, see Note, *The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964*, 37 U. Chi. L. Rev. 167, 175-176, we fail to see how this makes any difference in the application of the Seventh Amendment. Whether a purely private wrong or a wrong somehow associated with the public interest is to be vindicated, if Congress chooses to permit its vindication by a "civil action" in the courts, it must respect the commands of the Seventh Amendment. Suits to collect statutory penalties—clearly suits brought to redress offenses against the public interest—have long been considered suits to collect a debt which are triable to a jury. See *Hepner v. United States*, 213 U.S. 103, and cases there cited. See also *Fleitmann v. Welsbach Co.*, 240 U.S. 27, 29; *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510. This "public interest" concept might appropriately be used as a persuasive justification for the use of the equitable remedy of restitution. See *Porter v. Warner Holding Co.*, 328 U.S. at 402. The court in *Wirtz v. Jones*, 340 F.2d 901, 905 (5th Cir. 1965) referred to the fact that the suit was "to redress a wrong done to the public good" when it denied a jury trial in a suit by the government to enjoin violation of the Fair Labor Standards Act and to compel payment of withheld wages. However, the opinion makes it clear, citing as it does the *Porter* case, that the court was speaking of the equitable power to order restitution. If the remedy cannot fairly be characterized as restitution, however, the fact that the recovery sought is to redress a wrong done to the public good should not affect the right to a jury trial.

³⁸ *Porter v. Warner Holding Co.*, 328 U.S. 395. See note 32, *supra*.

³⁹ *Wirtz v. Jones*, 340 F.2d 901 (5th Cir. 1965). See note 37, *supra*. If, however, an employee rather than the government sues for back wages and liquidated damages under the Fair Labor Standards Act, the action is triable to a jury. See cases cited in *Wirtz* at p. 904. The employee's action is generally viewed as analogous to a common law action of debt or assumpait. The liquidated damages available to an individual plaintiff would not be recoverable in equity as restitution. In any event, the same recovery available as restitution in equity might also be available in the common law action for general assumpait. See 3 *Moore's Federal Practice* ¶ 38.24[2] at p. 190.5.

⁴⁰ One commentator's observation in the Title VII situation might apply equally well to other instances of restitution:

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Whether or not the jury trial issue was correctly resolved in the back pay cases arising under the 1964 Act,⁴⁰ we are satisfied that they are not applicable to the question presented to us under the 1968 statute.

VI.

As the district court correctly emphasized, there are persuasive reasons for interpreting § 812 to authorize "the court" but not a jury to award damages to an injured party. When those words are used in connection with the allowance of fees, they clearly describe the judge rather than the jury.⁴¹ Therefore, it is argued that the same words in the clause providing that the "court" may award damages must also refer to the trial judge rather than the jury.

The argument is persuasive but not compelling. The "award" may refer to the entry of judgment by the court just as the amount which a plaintiff may "recover" in antitrust litigation is finally determined by the court's judgment rather than the verdict of a jury, which is unmentioned in the Clayton Act but is undeniably required if demanded by either party.

Other language in the statute implies, without expressly stating, that a jury's participation is appropriate. The statutory reference to "damages" and also to "punitive damages" would normally contemplate a jury verdict as an element of the judicial process leading up to the final

⁴⁰ (Continued)

"However, it is important to note that the highly subjective questions of damages, which are often felt to be particularly appropriate for jury determination, are not present in Title VII cases. Back pay awards usually involve a definite amount for a definite period of time, and the total amount in controversy often can be stipulated by the parties. Most problems in determining the amount of a back pay award would be ones of computation rather than subjective evaluation." Comment, *The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964*, 37 U. Chi. L. Rev. 167, 173 (1969).

⁴¹ We note the conflicting views expressed by Judge Noel in *Ochoa v. American Oil Co.*, 338 F.Supp. 914 (S.D. Tex. 1972), but we, of course, express no opinion on the issue since it is not before us.

⁴² The proviso to subparagraph (e) states that the prevailing plaintiff shall be awarded fees if "said plaintiff in the opinion of the court is not financially able to assume said attorneys' fees." 42 U.S.C. § 3612(c).

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award." Certainly it is highly unusual for a federal statute to authorize a court to impose punishment, even if limited to \$1,000, without according the defendant the right to a jury trial.⁴⁴

The term "civil action" in legislation enacted since the merger of law and equity in 1938 is comparable to the words "action at law" or "suit in equity" which were used previously.⁴⁵ The words "action at law" implied a right to jury trial. The words "civil action," as *Beacon*, *Dairy Queen* and *Ross* make clear, do not in any sense imply that there is no right to a jury trial—a "civil action" asserting a legal claim is triable to a jury.

The legislative history of the 1968 act is silent on the question. There is no evidence that the proponents of the legislation expressed fear that the right to a jury trial would undermine the statute's effectiveness, or conversely, that opponents accepted any compromise in reliance on an assurance that juries could be demanded. The policy considerations which prompted the legislation probably favor a denial of the right; on the other hand, the more basic constitutional considerations which surround the

⁴⁴ Title VII of the Civil Rights Act of 1964, see 42 U.S.C. § 2000e-5(g), provides for back pay but not for "damages" or "punitive damages."

⁴⁵ A court of equity would not enforce a penalty or forfeiture absent a specific statutory authorization. See *Livingston v. Woodworth*, 56 U.S. (15 How.) 546, 559-560; *Stevens v. Gladding*, 58 U.S. (17 How.) 447, 453-454. (Except in admiralty, forfeiture cases are triable to a jury. *C. J. Hendry Co. v. Moore*, 318 U.S. 133, 153; 5 Moore's Federal Practice ¶ 38.12[7], subdivision 1 at p. 135.) Cf. *Decorative Stone Co. v. Building Trades Council of Westchester County*, 23 F.2d 426 (2d Cir. 1928), cert. denied, 277 U.S. 594. Furthermore, it appears that the few cases which have held that a court may decide if punitive damages shall be awarded have all been patent cases in which a jury trial was available on the issues of infringement and actual damages and the court merely decided, pursuant to unequivocal statutory language, whether the damages should be increased (up to a maximum of three times the actual damages). See *Seymour v. McCormick*, 37 U.S. 480, 488-489; *Swofford v. B. & W., Inc.*, 336 F.2d 406 (5th Cir. 1964), cert. denied, 379 U.S. 962; *Kennedy v. Lasko Co.*, 414 F.2d 1249 (3rd Cir. 1969). Those cases indicate that the jury shall determine the issue of actual damages; the latter two cases find that *Beacon* and *Dairy Queen* compel a jury trial on the actual damage question. It is one thing to permit a judge to increase the damage award after a jury trial in which a statutory violation has been found and actual damages awarded (the trial judge's right to set the amount of a fine in a criminal case after a jury trial on the factual issues is somewhat analogous); it is quite another thing to permit the imposition of punishment when there is no jury trial as an element of the judicial process leading up to that result.

⁴⁶ See 42 U.S.C. § 1983.

Opinion of Court of Appeals

right to a jury as a protection against the over-zealous judge, point the other way. Nor, if the right to have a jury represent a fair cross section of the community and the desirability of broadening lay participation in judicial implementation of civil rights are kept in mind, can one assert that policy considerations unequivocally favor one view rather than the other.

In the end, we look to another canon of construction as controlling in this case. As Mr. Justice Holmes stated in *United States v. Jin Fuey Moy*: "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." 241 U.S. 394, 401. See also *United States v. Campos-Serrano*, 404 U.S. 293.⁴⁶

Even if our discussion of the Seventh Amendment is deemed inadequate to overcome an unambiguous statutory denial of a jury trial in an action to recover compensatory and punitive damages, there are certainly enough "grave doubts upon that score" that we should place an interpretation on the statute which will avoid the constitutional issue. We therefore hold that it was error for the district court to refuse defendants' request for a jury trial.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

⁴⁶ And see *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 448-449.

"If, indeed, the construction contended for at the bar were to be given to the act of Congress, we entertain the most serious doubts, whether it would not be unconstitutional. No Court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution. . . ."

**Judgment of the Court of Appeals,
filed September 29, 1972**

Before:

HON. LUTHER M. SWYGERT, *Chief Judge*

HON. JOHN PAUL STEVENS, *Circuit Judge*

HON. WILLIAM J. CAMPBELL, *Senior District Judge*

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Wisconsin and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and this cause be and the same is hereby REMANDED to the said District Court for further proceedings, in accordance with the opinion of this Court filed this day.

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Supreme Court of the United States

MICHAEL RODAK, JR., CLERK

October Term, 1973

No. 72-1035

JULIA ROGERS,

Petitioner,

v.

**LEROY LOETHER and MARIANE LOETHER, his wife,
and MRS. ANTHONY PEREZ**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

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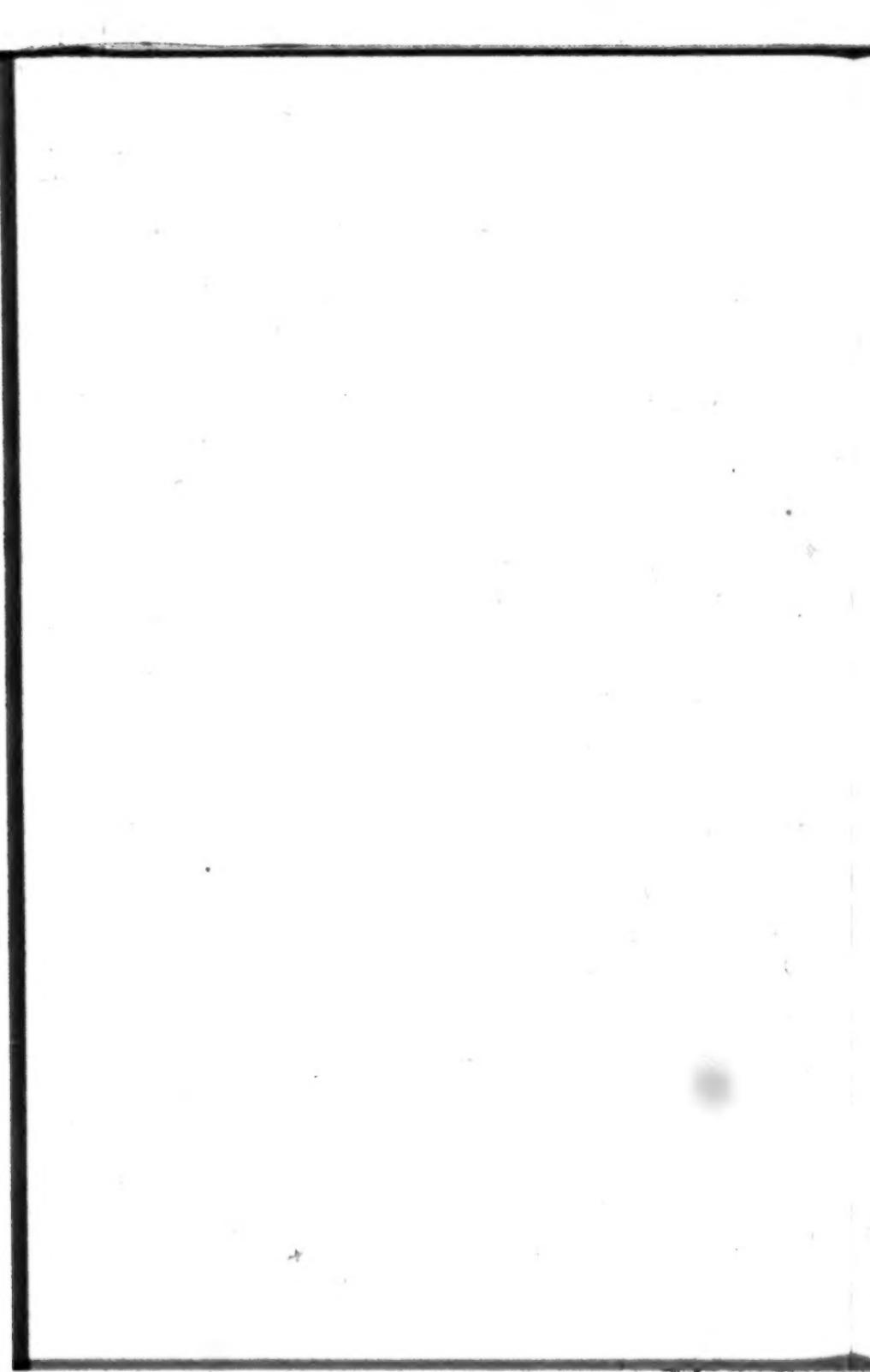


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IN THE
Supreme Court of the United States

October Term, 1973

No. 72-1035

JULIA ROGERS,

Petitioner,

v.

**LEROY LOETHER and MARIANE LOETHER, his wife,
and MRS. ANTHONY PEREZ**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the District Court denying the demand for jury trial is reported at 312 F. Supp. 1008, and is set out in the Appendix (23a-28a). The opinion of the District Court awarding punitive damages is unreported, and is set out in the Appendix (47a-51a). The opinion of the Court of Appeals is reported at 467 F.2d 1110, and is set out in the Appendix (53a-73a).

Jurisdiction

The Court of Appeals entered judgment on September 29, 1972. On December 14, 1972, Mr. Justice Rehnquist extended the time for filing this petition to January 27, 1973. The petition was filed on January 26, 1973, and was granted on June 11, 1973. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Question Presented

Whether Title VIII of the 1968 Civil Rights Act or the Seventh Amendment provide a right to jury trial to a landlord in a civil action alleging that he refused to rent an apartment to plaintiff because of her race and seeking an injunction and punitive damages.

Constitutional and Statutory Provisions Involved

1. United States Constitution, Amendment VII provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to rules of the common law.

2. Section 804(a) of the Civil Rights Act of 1968, 42 U.S.C. § 3604(a) provides:

As made applicable by section 803 and except as exempted by sections 803(b) and 807, it shall be unlawful—

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale

or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, or national origin.

3. Section 812 of the Civil Rights Act of 1968, 42 U.S.C. § 3612, provides:

(a) The rights granted by sections 803, 804, 805, and 806 may be enforced by civil actions in appropriate United States district courts without regard to the amount in controversy and in appropriate State or local courts of general jurisdiction. A civil action shall be commenced within one hundred and eighty days after the alleged discriminatory housing practice occurred: *Provided, however,* That the court shall continue such civil case brought pursuant to this section or section 810(d) from time to time before bringing it to trial if the court believes that the conciliation efforts of the Secretary or a State or local agency are likely to result in satisfactory settlement of the discriminatory housing practice complained of in the complaint made to the Secretary or to the local or State agency and which practice forms the basis for the action in court: *And provided, however,* That any sale, encumbrance, or rental consummated prior to the issuance of any court order issued under the authority of this Act, and involving a bona fide purchaser, encumbrancer, or tenant without actual notice of the existence of the filing of a complaint or civil action under the provisions of this Act shall not be affected.

(b) Upon application by the plaintiff and in such circumstances as the court may deem just, a court of the United States in which a civil action under this section has been brought may appoint an attorney for the plaintiff and may authorize the commencement of

a civil action upon proper showing without the payment of fees, costs, or security. A court of a State or subdivision thereof may do likewise to the extent not inconsistent with the law or procedures of the State or subdivision.

(c) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than \$1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: *Provided*, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

Statement of the Case

On November 7, 1969, plaintiff Julia Rogers commenced this action in United States District Court for the Eastern District of Wisconsin against Leroy and Mary Loether, white owners of an apartment in Milwaukee, and their agent Mrs. Anthony Perez. The complaint alleged the defendants had violated Section 804 of the Civil Rights Act of 1968 by refusing to rent an apartment to Mrs. Rogers because she is black. Plaintiff requested injunctive relief and \$1000 punitive damages but neither alleged nor sought actual damages (2a-6a). Jurisdiction of the District Court was based on Section 812 of the Act. After an evidentiary hearing on November 20, 1969, the court issued a preliminary injunction forbidding rental of the apartment pending final determination of the action (16a-17a). Defendants answered and demanded a jury trial of issues of fact.

Subsequent to the granting of the preliminary injunction, and at the urging of the District Court, repeated efforts were made to settle this matter by arranging for the plaintiff to move into the apartment at issue. Defendant Leroy Loether, however, adamantly refused to rent it to her. Finally, in April of 1970, five months after commencing this action, plaintiff was forced to lease a different apartment, and consented to the lifting of the preliminary injunction (47a).

On May 19, 1970, the District Court issued its opinion and order denying defendants' request for a jury trial (23a-28a). The District Court concluded that Title VIII of the Civil Rights Act of 1968 authorized the trial judge rather than a jury to assess damages, and that the court could exercise this equitable power consistent with the commands of the Seventh Amendment. The District Court awarded \$250 in punitive damages, but no costs, attorneys fees, or actual damages (47a-51a).

The Seventh Circuit reversed, holding that defendants' jury trial demand should have been granted. The court's opinion centered on its conclusion that an action to enforce Title VIII of the Civil Rights Act of 1968 is "in the nature of a suit at common law".

The court's extended constitutional analysis culminated in statutory interpretation. It found the district court's statutory analysis "persuasive but not compelling" and concluded that the statute "implies, without expressly stating, that a jury's participation is appropriate" when damages are sought. In the end the court viewed as "controlling" a canon of construction requiring the interpretation of statutes to avoid "grave doubts" of unconstitutionality and concluded that Title VIII of the Civil Rights Act of 1968 itself requires jury trials when damages are claimed.

Summary of Argument

I. a. The statutory language of Title VIII clearly contemplates that open housing cases arising thereunder shall be tried by a judge without a jury. Section 812(c) directs that "the court" may award damages and injunctive relief. The word "court" is used elsewhere in the statute where it can only refer to the judge, such as the provision in section 814 authorizing the court to expedite these cases. "The court" is used to denote the trial judge, as opposed to any jury, in the Federal Rules of Civil Procedure and numerous statutes. Congress must be presumed to have intended the "court" to have the same meaning throughout Title VIII, and to have the same meaning with which it was used by Congress elsewhere.

Had Congress desired to require a jury trial in these cases, it would have done so expressly, using the words "jury" or "jury trial", as it has in at least 22 other statutes.

b. At the 1966 Senate hearings on Title VIII, Attorney General Katzenbach expressly testified that Title VIII did not authorize jury trials. A committee member suggested amending the bill to provide juries as to some issues, but no such amendment was passed. The Attorney General's opposition to jury trials appears to have been based on his concern, expressed elsewhere in the hearings, that juries might refuse to enforce civil rights legislation.

As first proposed in 1966, Title VIII expressly provided for a jury trial in certain cases of criminal contempt. The different treatment of civil actions in the 1966 bill betokens a different intent on the part of the draftsmen.

c. Title VIII should not be interpreted as requiring jury trials merely to avoid possible doubts as to its validity under the Seventh Amendment, for there are equally im-

portant constitutional policies which might be adversely affected by such a statutory requirement.

For 35 years great concern has been expressed in Congress that juries, particularly in the South, would refuse to rule against white defendants in civil rights cases. Congressional proponents of civil rights legislation have consistently opposed jury trials in actions to enforce such statutes on the ground that hostile juries would nullify the proposed laws. Congress has granted a limited right to jury trial in contempt cases arising under some civil rights statutes, but has refused to do so for civil enforcement proceedings. A jury trial requirement in Title VIII cases might well defeat the statutory purpose of enforcing the Thirteenth and Fourteenth Amendments. Similarly, a jury hostile to blacks or open housing would be unlikely to afford an individual plaintiff her right to the fair hearing guaranteed by the Due Process clause of the Fifth Amendment.

Plaintiff does not maintain that these constitutional considerations could prevent a jury trial if a jury were otherwise required by the Seventh Amendment. But since there are constitutional policies militating both for and against jury trials, the statute should be given its plain meaning and its constitutionality under the Seventh Amendment directly faced and resolved.

II. a. There is no constitutional right to a jury trial in actions enforcing rights unknown at common law. This is such a case. At common law the owner of real property enjoyed unfettered discretion to refuse to sell or lease his property to any person for any reason. This discretion included the right to refuse to rent or lease property because of the race of the would-be tenant or buyer. Title VIII was enacted for the purpose of reversing this principle of common law.

The obligation of innkeepers at common law to serve all travellers seeking shelter is of no relevance here. That duty was limited to transients, not persons seeking permanent lodgings, and extended only to would-be guests who had no home near the inn. Moreover in the United States innkeepers were permitted to refuse to provide accommodations because of the race of a traveller.

b. The various forms of relief available in a Title VIII case are part of a single integrated equitable remedy. The statute contemplates that the judge will fashion a remedy in each case which will best promote the statutory policy of equal access to housing. The award of actual or punitive damages is discretionary, and in exercising that discretion the court may well consider whether injunctive relief has been awarded. Thus when, as here, actual or punitive damages are awarded, that relief is not damages as they were known at common law, but is part of an integrated equitable remedy awarded only after consideration of the availability and effectiveness of traditional equitable remedies.

c. Prior to the merger of law and equity by the Federal Rules of Civil Procedure, courts of equity had the unquestioned authority to award legal relief incidental to an equitable claim without recourse to a jury. Both actual and punitive damages were awarded in cases involving an equitable claim where resolution of these legal issues was essential to complete justice. This doctrine of equitable cleanup was applied even where, as in the instant case, the request for equitable relief was withdrawn or denied after the commencement of the action. Thus before the promulgation of the Federal Rules in 1938, this case would have been heard in equity and without a jury.

Since the merger of law and equity, this Court has expanded the right of jury trial in civil actions. *Beacon*

Theatres v. Westover, 359 U.S. 509 (1959). The meaning of the Seventh Amendment, however, was not changed by the Federal Rules. Rather, *Beacon Theatres* and its progeny apply an equitable practice, originating before the Seventh Amendment, of declining to assume jurisdiction over cases which could be adequately resolved at law so as to avoid unnecessarily impairing the rights available in legal proceedings. The instant case, however, involves a statutory requirement that Title VIII cases be tried to the court without a jury. In such a case, as in *Katchen v. Landy*, 382 U.S. 323 (1966), *Beacon Theatres* and its progeny are inapplicable and the law must be upheld unless it violates the Seventh Amendment itself. Since this case could have been heard in equity in 1791, the statute is constitutional.

L

Title VIII Provides That All Issues Shall Be Tried By a Judge Without a Jury.

a. Statutory Language

Congress has dealt in three ways with the question of whether there should be a jury trial in civil litigation arising under Federal statutes. In some statutes Congress has provided that all issues shall be tried before a judge or referee alone, without a jury. See e.g., *Katchen v. Landy*, 382 U.S. 323, 328-336 (1966) (Bankruptcy Act). A second group of statutes require that some or all issues must be decided by a jury, regardless of whether a jury trial is mandated by the Seventh Amendment. See 5 Moore's Federal Practice § 38.12; note 2, *infra*. A third class of statutes make no reference to the trier of fact, leaving the question of jury trial *vel non* to be resolved solely by reference to the Seventh Amendment. See e.g.,

Beacon Theatres v. Westover, 359 U.S. 500, 504 (1959) (Declaratory Judgment Act).

In the instant case plaintiff submits that Title VIII of the 1968 Civil Rights Act requires that all questions of law and fact in any action arising thereunder be decided by the judge, not by a jury. The District Court construed that statute in this manner. (26a-28a). The defendants have heretofore maintained that Title VIII neither required nor forbade a jury trial, and that the question must be resolved by reference to the Seventh Amendment. Hearing of April 30, 1970, pp. 2, 13; Brief for Defendant-Appellant, p. 18; District Court Brief In Support of Jury Trial, p. 6. The Court of Appeals went beyond the position urged by defendant and held that Title VIII requires a jury trial (71a-73a).

The express language of the statute clearly indicates that the court, not a jury, is to decide whether to award damages. Section 812(c) of the Civil Rights Act of 1968, 42 U.S.C. § 3612(c), provides:

The *court* may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than \$1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff. *Provided*, that the said plaintiff in the opinion of the *court* is not financially able to assume said attorney's fees. (Emphasis added)

The meaning of "the court" is undeniably the same throughout this section. The entity authorized to award actual and punitive damages is the same entity authorized to grant injunctive relief, temporary restraining orders, court costs,

and attorney's fees. It is beyond question that only the trial judge, sitting without a jury, would pass on injunctive relief or costs and fees, and the statutory language requires that the question of damages be resolved in the identical manner.

The phrase "the court" is used elsewhere in Title VIII in a context where it can only refer to the trial judge sitting alone, not a jury or the judge with a jury. In litigation following the failure of conciliation under the statute, it is "the court" which may enjoin discrimination or order affirmative action. 42 U.S.C. § 3610(d). If, after the commencement of litigation, conciliation efforts appear likely to result in a settlement, "the court" is required to continue the case. 42 U.S.C. § 3612(a). "The court" is authorized, under circumstances it deems just, to appoint an attorney for a plaintiff in civil litigation under the Act. 42 U.S.C. § 3612(b). Any "court" in which a Title VIII case is instituted must expedite it in every way. 42 U.S.C. § 3614. When the same words are used in different parts of the same statute, they should be construed as having the same meaning throughout. *United States v. Cooper Corporation*, 312 U.S. 600, 607 (1941).

In numerous other statutes the phrase "the court" is used not merely to denote the trial judge, but to distinguish a trial judge from any jury. "The court" is to assess the issue in contractual forfeiture cases unless a jury is requested by either party. 28 U.S.C. § 1874. In arbitration cases where a jury is authorized and requested, "the court" refers the appropriate issues to the jury and "the court" issues the appropriate order thereafter. 9 U.S.C. § 4. An involuntary bankrupt is entitled to a jury as to certain issues, and the bankruptcy proceeding must be postponed if a jury is demanded and no jury is in attendance upon "the court." 11 U.S.C. § 42. In proceedings to condemn a

variety of substances, "the court" directs the manner of disposal or destruction of the goods after the jury, if requested, has found they are in violation of the law. 7 U.S.C. §§ 135g(b), 136k, 1595; 21 U.S.C. § 1049. The statutory right to a jury trial in certain cases does not apply to contempts committed in the presence of "the court." 18 U.S.C. §§ 3691, 3692; 42 U.S.C. §§ 1995, 2000h. The phrase "the court" is used in the Federal Rules of Civil Procedure to denote the trial judge, particularly to describe responsibilities of a judge as distinguished from those of a jury. Federal Rules of Civil Procedure 39, 47, 49, 50, 51, 52, 53(e)(3), 57. Congress must be assumed to have been aware of this widely accepted meaning of the phrase "the court" when it used that phrase in Title VIII. *Malat v. Riddell*, 383 U.S. 569 (1966); *Banks v. Chicago Grain Trimmers Association*, 390 U.S. 459, rehearing den. 391 U.S. 929.

Particularly significant is the use of "the court" to denote the trial judge throughout the Jury Selection and Service Act of 1968. That statute provides that "the court" may allow extra preemptory challenges, "the court" passes on challenges for cause, "the court" orders that names of prospective jurors be drawn, "the court" may excuse jurors from service, "the court" may order that jury records be retained for more than four years, and "the court" is to pass on challenges to the jury selection procedure. 28 U.S.C. §§ 1866-1870. These provisions were first proposed as Title I of the Civil Rights Act of 1966, the same bill which contained in Title IV the open housing provisions at issue in this case. See generally Hearings Before a Subcommittee on Constitutional Rights of the House Judiciary Committee, 89th Cong. 2d Sess. (1966); H.R. 14765, 89th Cong. 2d Sess.¹ The Jury Selection Act was finally en-

¹ Section 406(c) of that bill was substantially the same as section 812(c) of the statute finally enacted. See p. 15 *infra*.

acted two weeks before Title VIII in 1968. It must be presumed that the draftsmen of the 1966 bill and the Congress which passed these laws two years later intended "the court" to have the same significance in both.

Had Congress desired to require a jury trial, it would have done so expressly as it has elsewhere. In at least 22 other statutes Congress has by law conveyed just such a right, in each case using the words "jury" or "jury trial."⁷

Congress clearly knew how to make known any desire for jury trials in Title VIII cases; its failure to do so can only betoken its intention to have those cases tried before a judge. Had Congress wished to assure defendants jury trials in Title VIII cases, it would not have authorized state administrative proceedings in housing discrimination cases, since such proceedings do not involve any right to trial by jury. 42 U.S.C. §§ 3610(c), 3615,⁸ *N.L.R.B. v. Jones*

⁷ 7 U.S.C. §§ 135g(b), 136k, 1595; 9 U.S.C. § 4; 11 U.S.C. § 42; 18 U.S.C. §§ 3691, 3692; 19 U.S.C. § 1305; 21 U.S.C. §§ 334(b), 882, 1049(a); 25 U.S.C. § 1302; 28 U.S.C. §§ 959, 1872, 1873, 1874, 2402; 39 U.S.C. § 840; 42 U.S.C. §§ 1995, 2000h; 46 U.S.C. § 688; 48 U.S.C. § 413.

⁸ At least twenty-four states have set up administrative agencies empowered to award damages.

Eleven state statutes expressly mention damages. Alaska Statutes, Title 18, § 22.10.020(c); California Civil Code § 35738(3); General Statutes of Connecticut, § 53-36; Hawaii Rev. Stat. § 515-13(b)(7); Ind. Code § 22-9-6(k)(i); Anno. Laws of Mass., Ch. 151 B, § 5; Minn. Statutes, § 363.071(2); New Mex. Stat. Anno. § 4-33-10 E; N.Y. Executive Law § 297(4)(e); General Laws of R.I. § 34-7-5(L); Wash. Rev. Code § 49.60.225. Twelve states authorize their agencies to order any affirmative action necessary to carry out the purposes of the state law. Del. Code Anno., § 4605(e); Iowa Code § 105A.9(12); Kan. Stat. Anno. § 44-1019; Ky. Rev. Stat. § 344.230; Anno. Code Md. Article 49B, § 14(e); N.H. Rev. Stat. Anno. § 354-A:9; N.J. Stat. Anno. § 10:5-17; Ohio Rev. Code Anno., § 4112.05(G); Pa. Stat. Anno., Title 43, Ch. 17, § 959; S.D. Human Relations Act of 1972, L. 1972, S.B. 111, § 11(12); W. Va. Code, § 5-11-10; Wisc. Stat. Anno. § 101.60. These provisions have uniformly been held to authorize orders directing the payment of

& Laughlin Steel Corp., 301 U.S. 1 (1937); *Edwards v. Elliott*, 88 U.S. 532, 557 (1874).

This construction of Title VIII is supported by the wording and judicial interpretations of section 706 of the Civil Rights Act of 1964, authorizing private actions to enforce the Title VII ban on employment discrimination. Section 706(g), 42 U.S.C. § 2000e(f)(g), provides that "the court" may give injunctive relief and back pay.⁴ The lower courts reaching this question have uniformly held that all issues in a Title VII case should be heard and decided by a judge.⁵

damages. *Jackson v. Concord Company*, 45 N.J. 113, 253 A.2d 793 (1969); *Robinson v. Pauley*, No. H 29-72 (W. Va. Human Rights Commission), Equal Opportunity in Housing [hereinafter "EOH"] § 17,504 (1972); *Bridges v. Mendota Apartments*, No. 898-H (D.C. Commission on Human Rights), EOH § 17,505 (1972); *Jacoby v. Wiggins*, No. H-1582 (Pa. Human Relations Commission), EOH § 17,502 (1972); *Lord v. Malakoff*, No. H-71-0062 (Md. Commission on Human Relations) EOH § 17,503 (1972); *In Re Consolidated Properties*, No. 228 (Ohio Civil Rights Commission), EOH § 17,506 (1972). The Oregon statute, Ore. Rev. Stat. § 659, 010-110, authorizing orders to "eliminate effects" of discrimination, has been held to authorize awards of damages. *Williams v. Joyce*, 4 Ore. App. 482, 479 P.2d 513 (1971).

⁴ "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay...."

⁵ *Robinson v. Lorillard Corporation*, 444 F.2d 791, 802 (4th Cir. 1971); *Johnson v. Georgia Highway Express*, 417 F.2d 1122 (5th Cir. 1969) reversing 47 F.R.D. 327, 330-31 (N.D. Ga. 1968); *Lowry v. Whitaker Cable Corporation*, 348 F. Supp. 202, 209 n.3 (W.D. Mo. 1972); *Williams v. Travenol Laboratories*, 344 F. Supp. 163 (N.D. Miss. 1972); *Ochoa v. American Oil Co.*, 338 F. Supp. 914 (S.D. Tex. 1972); *United States v. Ambac Industries*, 15 F.R.Serv. 2d 607 (D. Mass. 1971); *Gillin v. Federal Paper Board Co., Inc.*, 52 F.R.D. 383 (D. Conn. 1970); *Moss v. Lane Company*, 50 F.R.D. 122 (W.D. Va. 1970); *Cheatwood v. South Central Bell Tel. & Tel Co.*, 303 F.2d 754 (M.D. Ala. 1959); *Hayes v. Seaboard Coast Line R.R.*

b. Legislative History

The legislative history of Title VIII indicates that the statute was intended to preclude jury trials in actions such as this. A federal fair housing law was first proposed by President Johnson as part of the Civil Rights Act of 1966.⁶ Section 406 of the administration bill, like section 812(c) of the statute enacted two years later, authorized "the court" to award damages.⁷ At the Senate hearings on 1966 Senator Ervin expressly inquired as to whether a jury trial was provided by the proposed bill.

Senator Ervin. Now, I would like to know under the same subsection (c) of section 408 [sic] who determines the amount of damages that are to be awarded if a case is made out under Title IV of the bill.

Attorney General Katzenbach. The court does.

Senator Ervin. That is the judge.

Attorney General Katzenbach. Yes, sir.

Senator Ervin. There is no jury trial.

Attorney General Katzenbach. No, sir.

Senator Ervin. Well, is the administration opposed to or has it forsaken the ancient American love for trial by jury?

Co., 46 F.R.D. 49 (S.D. Ga. 1969); *Culpepper v. Reynolds Metals Co.*, 296 F. Supp. 1232 (N.D. Ga. 1968), rev'd on other grounds 421 F.2d 888 (5th Cir. 1970); *Lea v. Cone Mills*, Civil Action No. C176-D-66 (N.D. N.C., order dated March 25, 1968); *Banks v. Local 136, I.B.E.W.*, Civil Action No. 67-598 (N.D. Ala., order dated January 25, 1968); *Anthony v. Brooks*, 67 LRRM 2897 (N.D. Ga. 1967). *Lea*, *Banks* and *Anthony* were decided prior to the enactment of Title VIII.

⁶ 112 Con. Rec. 9390 (1966).

⁷ "The court may grant such relief as it deems appropriate, including a permanent or temporary injunction, restraining order, or other order, and may award damages to the plaintiff, including damages for humiliation and mental pain and suffering, and up to \$500 punitive damages." S. 3296, § 406(e), 89th Cong. 2d Sess., 112 Cong. Rec. 9397 (1966).

Attorney General Katzenbach. No, sir. I assume if there was a suit here that was for purely damages that the court would use a jury.

Senator Ervin. Would the administration have any objection to subsection (c) being amended to spell out the fact that a man has a right to have the issues of fact arising in the case and the amount of damages determined by a jury instead of the judge.

Attorney General Katzenbach. No, in a damage suit I have no objection to that. With respect to the equitable relief I would, obviously.*

Neither an amendment like that proposed by Senator Ervin, providing for a jury trial on all issues of fact, nor an amendment like that acquiesced to by Attorney General Katzenbach, providing for a jury trial as to damages, was passed by the Congress. Instead this provision was enacted two years later in essentially the form objected to by Senator Ervin.* The reason for the Attorney General's opposition to jury trials in Title VIII cases was made clear elsewhere. At a House hearing that year on the same Act

* Hearings on S. 3296 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 2nd Sess., pt. 2, 1178 (1966).

* Attorney General Katzenbach's prediction that courts would use juries in damage only actions seems to refer to the use of advisory juries. See Rule 39(c) Federal Rules of Civil Procedure. The term "use" as applied to juries is generally employed to describe the role given an advisory jury, not a jury sitting as the ultimate trier of the facts. See 5 Moore's Federal Practice ¶ 39.10. Such advisory juries have in fact been used under the similar provision of Title VII. *Cox v. Babcock and Wilcox Company*, 471 F.2d 13 (4th Cir. 1972); *Moss v. Lane Company*, 471 F.2d 853 (4th Cir. 1973). The Attorney General's assumption regarding future practice under Title VIII does not purport to be a construction of those provisions. For reasons set forth *infra*, pp. 27 and 39, a jury trial would not be constitutionally required in an action seeking only damages.

Attorney General Katzenbach was asked his views on a proposed bill creating a civil action for damages on behalf of victims of civil rights related violence. He responded candidly, "I would not be sanguine in such community about the capacity to recover from a jury in that situation. I would be inclined to doubt it might occur."¹⁰ The Attorney General expressed similar reservations about the likelihood of obtaining convictions from any jury under a proposal to make criminal economic coercion in civil rights cases.¹¹

This construction of section 812(c) is supported by the treatment of jury trials in contempt cases during the legislative history of Title VIII. The first proposed provision, Title IV of the 1966 Civil Rights Act, expressly directed that in any contempt proceeding for violation of any injunction under that Title the defendant would be entitled to a trial *de novo* before a jury if the court upon conviction set a fine in excess of \$300 or imprisonment for more than 45 days.¹² Attorney General Katzenbach testified he

¹⁰ Hearings Before a Subcommittee of the House Judiciary Committee, 89th Cong., 2d Sess., 1183 (1966). The Civil Rights Act of 1966 and 1968 proposed by the President dealt with discrimination in jury selection as well as in housing. The Fair Housing Law and the Jury Selection and Service Act were enacted within weeks of each other in 1968. See p. 12 *supra*. The instant hearings dealt with both problems, and included testimony regarding the refusal of southern juries to convict white defendants in civil rights cases. See e.g. *Id.* at 1321 (Remarks of Congressman Ryan), 1331 (Remarks of Congressman Diggs), 1142 (Remarks of Roy Wilkins), 1519 (Remarks of Whitney Young).

¹¹ Hearings on S. 3296 before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 89th Cong., 2d Sess. 175-176 (1966).

¹² Section 410 of the bill provided: "All cases of criminal contempt arising under the provisions of this title shall be governed by section 151 of the Civil Rights Act of 1957 (42 U.S.C. 1995)." Section 1995 provides in pertinent part:

In all cases of criminal contempt arising under the provisions of this Act, the accused, upon conviction, shall be pun-

supported this limited right to jury trial as "a quite wise balance between the need of the Court to have respect and to vindicate its own decisions, and for the right of the individual not to have any major encroachments on his freedom and liberty without the benefit of trial by jury."¹³ The proposed Fair Housing Act of 1967, supported by the administration, made no express reference to the problem of criminal contempts,¹⁴ tacitly relegating that matter to the inherent power of the courts to enforce their decrees and the limitations thereon imposed by this Court. *Cheff v. Schnackenberg*, 384 U.S. 373 (1966).¹⁵ Similarly the bill finally enacted by Congress in 1968 deleted this jury trial requirement. Had the original draftsmen of section

ished by fine or imprisonment or both: *Provided, however*, That in case the accused is a natural person the fine to be paid shall not exceed the sum of \$1,000, nor shall imprisonment exceed the term of six months: *Provided further*, That in any such proceeding for criminal contempt, at the discretion of the judge, the accused may be tried with or without a jury: *Provided further, however*, That in the event such proceeding for criminal contempt be tried before a judge without a jury and the sentence of the court upon conviction is a fine in excess of the sum of \$300 or imprisonment in excess of forty-five days, the accused in said proceeding, upon demand therefor, shall be entitled to a trial de novo before a jury, which shall conform as near as may be to the practice in other criminal cases.

¹³ Hearings Before a Subcommittee of the House Judiciary Committee 89th Cong., 2d Sess. 1238-39 (1966); see also Hearings Before the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 89th Cong., 2d Sess. 17 (1966).

¹⁴ S. 1358, 90th Cong., 1st Sess.; see Hearings Before the Subcommittee on Housing and Urban Affairs of the Senate Banking and Currency Committee, 90th Cong., 1st Ses. 1-7 (1967) (Testimony of Attorney General Clark).

¹⁵ The right to jury trial afforded by the Sixth Amendment is, in general, limited to cases involving sentences in excess of six months. *Bloom v. Illinois*, 391 U.S. 194 (1968). The jury trial authorized by the 1966 bill covered sentences exceeding 45 days as well as fines of more than \$300. See n. 12 *supra*.

812(c) in 1966 desired jury trials in civil actions thereunder, they would have said so expressly as they did at first regarding criminal contempts. It is unlikely that Congress, having considered and declined to authorize jury trials in such contempt cases, would have required such trials in civil actions whose consequences to a defendant were far less serious.

c. Constitutional Consideration

The Court of Appeals refused to construe Section 812 as requiring that all issues be tried to a judge because of its "grave doubts" as to the constitutionality of the statute if so construed. The Court of Appeals applied the established canon of construction that, where fairly possible, statutes should be interpreted so as to avoid serious question as to their constitutionality (Pp. 71a-73a). That canon, however, has no application where important constitutional considerations militate in favor of both alternative constructions under consideration. In this case the statutory requirement that these cases be tried to judges rather than juries is essential to carrying out the Act's purpose of enforcing the guarantees of the Thirteenth and Fourteenth Amendments, and to assure to plaintiffs the fair trial guaranteed by the Due Process Clause of the Fifth Amendment. Under such circumstances the canon can provide no guidance, and the Court must construe the statute in view of its language and history and then resolve any constitutional questions which may arise.

Congress's decision to bar jury trials in Title VIII cases occurred in the context of 35 years of congressional concern, debate and legislation concerning the role of juries in civil rights legislation. For several generations after Reconstruction Congress took no action to effectuate the guarantees of the Thirteenth, Fourteenth and Fifteenth

Amendments. During the 1930's federal legislation was proposed under the Fourteenth Amendment to deal with lynchings in the South. One of the few such proposals to reach the floor of either house was a bill introduced by Senator Wagner to authorize criminal and civil damage actions against public officials or local governments which failed to prevent such lynchings.¹⁶ Senator Bailey of North Carolina, opposing the bill, openly predicted that southern juries would refuse to enforce the law.

I say to the Senate that when that kind of suit is brought, in the first place, the jury in the county is not going to bring in a verdict for the Attorney General of the United States. Oh no—we are not going to think of doing such a thing. . . . I have tried cases for 25 years in the United States and in the state courts of North Carolina, and I have never known any difference as to juries. They are a fine body of men in either circumstance, but they are men who have a sense of loyalty to their county and a sense of loyalty to their people.¹⁷

The anti-lynching bill never came to vote. In 1949 Congressman Powell of New York proposed a Fair Employment Practices Act to end racial discrimination in hiring and promotion.¹⁸ Representative Powell proposed that enforcement be entrusted to a Fair Employment Practices Commission similar to the National Labor Relations Board, in part because "commission procedure avoids the necessity of criminal penalties which juries hesitate to invoke." 96 Cong. Rec. 2168. This denial of a right to trial by

¹⁶ H.R. 1507, 75th Cong. 2d Sess.

¹⁷ 82 Cong. Rec. 77 (1937); see also 83 Cong. Rec. 141 (1938) (Remarks of Senator Borah).

¹⁸ H.R. 4453, 81st Cong. 2nd Sess.

jury was objected to by opponents of the bill, 96 Cong. Rec. 2177, 2182, 2200, 2201, 2203, 2204, 2249, and an amendment to deny enforcement powers to the Commission was narrowly passed, 96 Cong. Rec. 2253. The bill was approved by the House only to die in the Senate.

The conflict between the use of jury trials and the effective enforcement of civil rights legislation was fully aired in the debates leading to the Civil Rights Act of 1957.¹⁹ When the bill was first proposed in 1956, Attorney General Brownell asked for civil rather than criminal sanctions so as to avoid jury trials, 102 Cong. Rec. 13141, and the administration bill provided there would be no jury trial in contempt prosecutions for violation of injunctions obtained by the United States. Proponents of the bill argued at length that jury trials for contempt would nullify the statute, since racially prejudiced purors would refuse to convict.²⁰ Numerous instances were cited in which southern juries had refused to indict or convict white defendants accused of violence against blacks or civil rights workers.²¹

¹⁹ 71 Stat. 634; see 28 U.S.C. §§ 1343, 1861; 42 U.S.C. §§ 1971, 1975-1975e, 1995.

²⁰ 102 Cong. Rec. 13175. (Remarks of Congressman Roosevelt); 102 Cong. Rec. 8409 (Remarks of Congressmen Madden, Scott), 8412 (Remarks of Congressman Keating), 8418 (Letter from the Attorney General), 8488 (Remarks of Congressman Chudoff), 8505 (Remarks of Congressman Addonizio), 8509 (Remarks of Congressman Pelley), 8535 (Remarks of Congressman Hillings), 8648 (Remarks of Congressman Dennison), 9193 (Remarks of Congressman Powell), 9216 (Remarks of Congressman Ashley), 12801 (Remarks of Senator Morse), 13312 (Remarks of Senator Knowland), 13316-17 (Remarks of Senator Morse), 13334 (Remarks of Senator Douglas).

²¹ 103 Cong. Rec. 8490 (Remarks of Congressman Cellar), 12535 (Remarks of Senator Javits), 12588 (Remarks of Senator Humphrey), 12848 (Remarks of Senator Case), 12893 (Remarks of Senator Javits). See also n. 10, *supra*.

Senator Douglas urged:

[O]bvious[ly], southern juries . . . will tend to have color bias to begin with. Second, . . . at the termination of their service they must go back into the communities from which they came and be exposed to all the economic, social and at times physical pressures which may be brought to bear. . . . [I]t would be extremely difficult to obtain any deserved enforcement. . . . [Judges] tend to have greater respect for the law . . . [and] are somewhat insulated from the passions and prejudices of their community.²³

Proponents of a jury trial requirement repeatedly insisted that the right to trial by jury should apply to criminal contempts as to all other crimes, as a matter of policy or constitutional law.²⁴ The House rejected a jury trial requirement in contempt cases, 103 Cong. Rec. 9219, but the Senate adopted an amendment authorizing jury trials, 103 Cong. Rec. 13356, and the statute finally enacted provided a limited right to such trials. 42 U.S.C. § 1995.²⁴

Since the 1957 debates the dispute has continued with varying results. In the 1960 Civil Rights Act Congress

²³ 103 Cong. Rec. 12804.

²⁴ 102 Cong. Rec. 13180 (Remarks of Congressman Rivers); 103 Cong. Rec. 2014 (Minority Report), 8414 (Remarks of Congressman Colmer), 8501 (Remarks of Congressman Hyde), 8502 (Mr. Winstead), 8508 (Remarks of Congressman Poff), 8545 (Remarks of Congressman Abiff), 8552 (Remarks of Congressman Brown), 8559 (Remarks of Congressman Abernethy), 8649 (Remarks of Congressman Smith), 8655 (Remarks of Congressman Tuck), 8657 (Remarks of Congressman Davis), 8666 (Remarks of Congressman Ashmore), 8839 (Remarks of Congressman Smith), 9042 (Remarks of Congressman Walter), 12531 (Remarks of Senator O'Mahoney), 12571 (Remarks of Senator O'Mahoney), 12651 (Remarks of Senator Johnson), 13005 (Remarks of Senator Ervin) 13326 (Remarks of Senator Church). Congressman Poff also denied southern juries would refuse to enforce the law. 103 Cong. Rec. 8509.

²⁴ *Supra*, n. 12.

gave the courts power to enjoin certain discriminatory conduct without providing jury trials for contempt, despite the objection that this was part of "the growing tendency to do away with the jury system in the Federal courts."²⁵ The 1964 Civil Rights Act provided a right to jury trials in most cases of contempt, 42 U.S.C. § 2000h, but provided for non-jury trial civil actions arising in employment discrimination cases. 42 U.S.C. § 2000e-5; see n. 5, *supra*. As in 1957, the contempt jury trial provision was rejected by the House but imposed by the Senate,²⁶ and the debate closely resembled that of 1957.²⁷ That no jury trial would be available in civil actions for injunction and back pay was reiterated in the Senate debates by one of the bills' floor managers, in response to repeated questions by Senator Ervin; neither Senator Ervin nor any other proponent of jury trials in contempt cases asked for such trials in civil enforcement proceedings.²⁸ In the 1965 Voting Rights Act Congress gave the limited right to jury trial in contempt cases provided by the 1957 Act, 42 U.S.C. § 1973l,

²⁵ 106 Cong. Rec. 6375 (Remarks of Congressman Brooks); Senator Clark urged, "Certainly one cannot be confident that a jury drawn from the citizens in the southern district of Mississippi would be eager to make such a finding in favor of Negro fellow citizens who have been denied the right to vote! . . ." 106 Cong. Rec. 7241.

²⁶ 110 Cong. Rec. 2804 (House Vote), 13051 (Senate Vote).

²⁷ For arguments that jury trials would emasculate the law, see 110 Cong. Rec. 1993 (Remarks of Congressman Taft), 2266 (Remarks of Congressman Gilbert), 8660 (Remarks of Senator Morse), 9818 (Remarks of Senator Javits), 12958 (Remarks of Senator Humphrey). Advocates of jury trials once again pointed to the Constitution, 110 Cong. Rec. 8700 (Remarks of Senator Fulbright), 9565 (Remarks of Senator Johnston), 9681 (Remarks of Senator Long). See generally 110 Cong. Rec. 9572-3, 10164-5, 2272, 8649-57, 8700-8703, 10077-80, 10563-4, 12926, 11204-5, 10340-1, 9685-6, 10203-09, 9817-19, 9917-19, 10111, 11012, 10199-203, 12953-4, 13050-1.

²⁸ 110 Cong. Rec. 7693. Senator Ervin did make such a proposal eight years later. See n. 30, *infra*.

the House having rejected, after brief debate, an amendment that would have required jury trials in all contempt cases. 111 Cong. Rec. 16263. The proponents of open housing legislation first proposed and then deleted the limited jury trial right in contempt cases in the 1957 statute, and the Congress which enacted Title VIII also established new rules to prevent racial discrimination in the selection of federal juries.²⁹

In sum, Congress, out of a repeatedly expressed concern that juries would refuse to enforce civil rights legislation, has provided only a limited right to jury trial in criminal contempt cases arising under such enactments, and has consistently refused to sanction jury trials in civil enforcement proceedings.³⁰ A similar concern has been expressed by a number of lower courts in enforcing civil rights legislation.³¹

²⁹ See *supra*, p. 12.

³⁰ In 1972 Senator Ervin proposed to require jury trials in Title VII civil actions, conceding the Seventh Amendment did not apply to such equitable proceedings but urging that its salutary policies should be enforced in all such cases. Senator Javits objected, "If it is valid for this, why is it not valid for all proceedings under the 14th amendment, which would include education, housing, and everything else in the Civil Rights Act of 1964?" The proposal was rejected. 118 Cong. Rec. 2277-2278 (Feb. 22, 1972) (Daily Ed.).

³¹ The District Court at oral argument on the jury trial motion in this case:

"[T]his issue has been debated as long as I can remember in Congress and all the civil rights legislation passed since 1948, I believe. And I think the general consensus is that if you have jury trials, civil rights legislation, you don't really result in very effective legislation, so Congress—pro civil rights people shred away from it." Hearing of April 30, 1970, p. 13.

In *Lawton v. Nightingale*, 345 F.Supp. 683, 684 (N.D. Ohio, 1972), the district court held there was no right to a jury trial for damages under 42 U.S.C. § 1983:

"[A] contrary holding would, in many instances, totally defeat the purposes of § 1983. If a jury could be resorted to in

The constitutional policies which such legislation enforces, in this case those of the Thirteenth and Fourteenth Amendments, are no less important than those of the Seventh. Plaintiff does not maintain that the protections of the Bill of Rights should not extend to defendants in civil rights cases; on the contrary, plaintiff recognizes that those protections, including the right to jury trial, are a bulwark against government oppression, and should not be withheld even in the name of liberty itself. Compare *United States v. Barnett*, 376 U.S. 681 (1964). A seriously delimiting limitation on Title VIII may be imposed if unequivocally required by the Seventh Amendment, but should not be merely because of "serious doubts." The Court should accord section 812 its natural interpretation as prohibiting jury trials, and resolve explicitly the Seventh Amendment questions posed by that construction.²²

actions brought under this statute, the very evil the statute is designed to prevent would often be attained. The person seeking to vindicate an unpopular right could never succeed before a jury drawn from a populace mainly opposed to his views. This is particularly the problem in the present case, where the plaintiff is so unpopular, scorned and condemned that this Court's granting of preliminary injunctive relief provoked rioting among his protesting fellow students, and editorial denunciation from the local information media."

See also Note, *Jones v. Mayer*: The Thirteenth Amendment and the Federal Anti-Discrimination Laws, 69 Colum. L. Rev. 1019, 1051; Comment, The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964, 37 U. Chi. L. Rev. 167, Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1264; Note, The Right to Nonjury Trial, 74 Harv. L. Rev. 1176 (1961).

²² During the 1957 voting rights debates Senator Bricker commented:

"[The] power [of Congress] in that field is plenary, so long as it is confined to the enforcement of the Fifteenth Amendment. That power should not be crippled by jurors drawn from the very community in which voting by some of our citizens is prevented or discouraged by a majority of the resi-

At stake in the instant case is not only the enforcement of vital legislative and constitutional policies, but also the right of an individual litigant to a fair trial. Aside from the constitutional basis of the instant statute, plaintiff is entitled to have her claims heard by a fair trier of fact, not a jury hostile to her from the outset because of its personal prejudices against blacks or against open housing. This Court has long recognized the right of a litigant under the Due Process clause of the Fifth Amendment to a verdict untainted by racial prejudice or discrimination. *Moore v. Dempsey*, 261 U.S. 86, (1923); *Shepherd v. Florida*, 341 U.S. 50, 55 (1951).

Plaintiff does not of course maintain that a constitutional fair jury trial would be impossible to obtain in a case such as this. Extensive *voir dire*, for example, could substantially increase the likelihood of an impartial panel. See, e.g., *Connecticut v. Seale* (No. 15844, Dist. Ct. New Haven); Garry, "Attacking Racism in Court Before Trial," Ginger, Minimizing Racism in Jury Trials (1969). But the substantial danger that litigants in civil rights cases will not get a fair hearing if subject to the whims of a racially biased jury requires that jury trials in such cases only be provided if the Seventh Amendment will permit no other result.

dents. . . . We cannot hope to reconcile these competing values —effective enforcement of the right to vote and the right to trial by jury—by a literal reading of the Constitution. . . . I have confidence that the Federal Judiciary will work out the problem without doing violence to any fundamental principles which we have always considered to pertain to the inalienable rights of the people of the United States." 103 Cong. Rec. 13003-05.

II.

The Seventh Amendment Does Not Require Jury Trials in Actions Arising Under Title VIII.

Section 812(c) requires that Title VIII cases be tried by the court without a jury, and any federal statute carries with it a presumption of constitutionality. *United States v. Di Re*, 332 U.S. 581, 585 (1948.) Under the decisions of this Court no jury trial is required in a civil action if either the right being reinforced is one unknown at common law, or the remedy involved is one which equity could have afforded. Both of those circumstances are present in cases arising under Title VIII.

a. The Rights Protected by Title VIII Were Unknown At Common Law

The Seventh Amendment preserves the substance of the right to a jury trial which existed at common law when the Amendment was adopted in 1791. The amendment is, by its own terms, merely preservative, in marked contrast to the other guarantees of the Bill of Rights which are expansive in nature and adapt to include within their coverage problems which could not have been foreseen when they were enacted. Compare *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958). The constitutional right to jury trials is preserved in, but limited to, suits which the common law recognized among its old and settled precedents and suits involving such legal rights and remedies in modern guise. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830).

When Congress creates new rights which did not exist at common law and are not analogous to rights that were recognized at common law, however, it is free to grant or deny the right to jury trial as long as the procedure it

established satisfies due process. Prior to the National Labor Relations Act²³ an employer was free to refuse to hire union members and to fire employees who joined a union. Any prohibition against interference by employers with self-organization of employees was not only unknown, but obnoxious to the common law.²⁴ The Act reversed this rule and guaranteed to employees the right to organize without coercion or interference by their employer. The Act authorized an award of wages and back pay for violations of the law without recourse to a jury, and this Court sustained that procedure:

"It is argued that [assessment of such awards] is equivalent to a money judgment and hence contravenes the Seventh Amendment with respect to trial by jury . . . The Amendment thus preserves the right which existed under the common law when the Amendment was adopted . . . It does not apply where the proceeding is not in the nature of a suit at common law . . .

The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement."

N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937).

This Court has held that, because the right involved did not exist at common law, the Seventh Amendment does not

²³ 29 U.S.C. §§ 151 *et seq.*

²⁴ *Aquilines Inc. v. N.L.R.B.*, 87 F.2d 146, 150 (5th Cir. 1936).

guarantee a jury trial in actions for damages against the United States, *McElrath v. United States*, 102 U.S. 426, 440 (1880), suits to recover improperly collected taxes, *Wickwire v. Reinecke*, 275 U.S. 101, 105-106 (1929), or administrative proceedings to cancel a naturalization certificate, *Luria v. United States*, 231 U.S. 9, 11 (1913), assess penalties for unlawful transportation of aliens, *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 329 (1909), or appraising the value of dutiable goods, *Passavant v. United States*, 148 U.S. 214, 221 (1893). The ability of a court to award damages without a jury because the right sued upon was unknown at common law was upheld in actions for violation of the Railway Labor Act, *Brady v. T.W.A., Inc.*, 196 F. Supp. 504 (D. Del. 1961), to compel arbitration as to back pay, *Northwest Airlines, Inc. v. Airline Pilots Assn., Intl.*, 373 F.2d 136, 142 (8th Cir. 1967), cert. denied 389 U.S. 827 (1967), for wages unlawfully withheld in violation of the Fair Labor Standards Act, *Wirtz v. Wheaton Glass Co.*, 253 F. Supp. 93, 95 (D. N.J. 1966), for refund of rent overcharges pursuant to the Emergency Price Control Act, *Creedon v. Arielly*, 8 F.R.D. 265, 268 (W.D. N.Y. 1948), and to collect back pay under Title VII of the 1964 Civil Rights Act.²⁵

The right of a black person to sue for redress because of a racially motivated refusal to sell or lease real property was certainly unknown at common law. At common law, a citizen was free to contract or not contract for the sale or disposition of his land, goods, and services, and this liberty was held to be protected against unreasonable gov-

²⁵ *Culpepper v. Reynolds Metals Co.*, 296 F.Supp. 1232, 1241 (N.D. Ga. 1968), *rev'd on other grounds*, 421 F.2d 888 (5th Cir. 1970).

ernment infringement by the Due Process Clause of the Fourteenth Amendment.²⁶

The common law freedom of contract and alienation were uniformly held to entitle a landowner to refuse to sell his property because of the race of the would-be buyer.²⁷ Nor was there any redress at law if a property owner refused to lease on account of race.²⁸

²⁶ *Allgeyer v. Louisiana*, 165 U.S. 578, 587 (1897); *Booth v. Illinois*, 184 U.S. 425, 428 (1902); *Bean v. Patterson*, 122 U.S. 496, 499 (1887). Chief Justice Marshall referred to "that absolute power which a man possesses of his own property, by which he can make any disposition of it which does not interfere with the existing rights of others." *Sexton v. Wheaton*, 21 U.S. (8 Wheat.) 229, 242 (1824). The right of free alienation or disposition in any lawful manner was held to be one of the chief elements of property, as that term was understood at common law. *Jones v. Clifton*, 101 U.S. 225, 228-229 (1880); *Osage Oil & Refining Co. v. Chandler*, 287 F. 848 (2d Cir. 1923).

²⁷ A refusal to sell on the grounds of race gave the would-be buyer no legal remedy whatsoever. *People ex rel. Gaskill v. Forest Home Cemetery Co.*, 258 Ill. 36, 101 N.E. 219 (1913); *Koehler v. Rowland*, 275 Mo. 573, 205 S.W. 217 (1918). "[I]f it was distasteful to plaintiff to have a colored man as his adjoining neighbor, he had the legal right to refuse to sell him or his agents the property in controversy. In other words, no man is bound to sell his property to a proposed purchaser, whose presence is unsatisfactory to him as a neighbor, whether he be white, black, or of some other color." *Keltner v. Harris*, 196 S.W. 1, 2 (Mo. 1917).

²⁸ *Dorsey v. Stuyvesant Town Corp.*, 299 N.Y. 512, 87 N.E.2d 541 (1949), cert. denied, 339 U.S. 981 (1950); *Wyatt v. Adair*, 215 Ala. 363, 110 So. 801 (1926). "The individual citizen, whether he be black or white, may refuse to sell or lease his property to any particular individual or class of individuals." *Corrigan v. Buckley*, 299 F. 899, 901 (D.C.Cir. 1924), *app. dism.*, 271 U.S. 323 (1926). "[W]hen the defendant refused to lease apartments to the plaintiff [who was Jewish] it exercised only the right which every landlord undoubtedly has to make his own selection of tenants." *Alsb erg v. Lucerne Hotel Co.*, 46 Misc. 617, 618, 92 N.Y.S. 851, 852 (1905). "Non-Caucasians are and always have been just as free to restrict the use and occupancy of their property to members of their own races as Caucasians have been. The fact that the members of the Caucasian race have freely availed themselves of this right throughout the nation, even though those of the non-

The force of the law was available to assist a white land-owner who wished to prevent the purchase or lease of land by blacks. "At the time the United States Constitution containing the first ten amendments was adopted, slavery was a legal and economic fact of life. . . . It is tautological that actions alleging racial discrimination could have not then been maintained for race discrimination had as its support the full weight and authority of law." *Marr v. Rife*, Civ. No. 70-218 (S.D. Ohio, opinion dated August 31, 1972.) In certain states of the ante-bellum South, free blacks were legally incapable of taking or acquiring any leasehold or freehold interest in real property. *Heirn v. Bridault*, 37 Miss. 209 (1859); *Beall v. Drane*, 25 Ga. 430 (1857). See also *Swoll v. Oliver*, 61 Ga. 248 (1878). Ratification of the Thirteenth and Fourteenth Amendments ended state restrictions on the power of blacks to lease or own property, but before *Shelley v. Kraemer*, 334 U.S. 1 (1948), the use of racially restrictive covenants in deeds and conveyances frequently prevented black citizens from buying property. Such covenants were recognized and enforced in many states. See e.g. *United Cooperative Realty Co. v. Hawkins*, 269 Ky. 563, 108 S.W.2d 507 (1937); *Los Angeles Investment Co. v. Gary*, 181 Cal. 680, 186 P. 596 (1919); *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 67 So. 641 (1915); *Parmalee v. Morris*, 218 Mich. 625, 188 N.W. 330 (1922); *Chandler v. Zeigler*, 88 Col. 1, 291 P. 822 (1930); *White v. White*, 108 W. Va. 128, 150 S.E. 531 (1929); *Cornish v. O'Donoghue*, 30 F.2d 983 (D.C. Cir. 1929). This

Caucasian races have not, is the most satisfactory proof of the public policy of the nation with respect to this phase of the right to contract. . . . The right to contract with reference to their own property is one that is preserved to all citizens and, except where restricted by law, is a right which the peoples of all races may exercise freely." *Burkhardt v. Lofton*, 63 Cal. App.2d 230, 238, 146 P.2d 720, 724-725 (1944).

Court held that the states could so assist white landowners desirous of discriminating against blacks, *Corrigan v. Buckley*, 271 U.S. 323, and ruled that Congress was not authorized by the Thirteenth and Fourteenth Amendments to prohibit such "[i]ndividual invasion of individual rights." *Civil Rights Cases*, 109 U.S. 3, 11 (1883).

Against this background, congressional opponents of Title VIII asserted repeatedly that the proposed open housing law would violate long established principles of private property. Senator Byrd argued:

I am expressing the hope that Senators will want to retain that age-old property right which has come down to us from the earliest days of the *common law*: the right to manage, to use, to dispose of one's property whether or not the individual lives in the dwelling, according to the dictates of his own conscience and his own good judgment. . . .

I cannot understand how any one would urge that a would-be purchaser should have any legal claim, any constitutional claim, any moral claim, or any natural claim on that which he does not possess.

I hope that the Senate does not intend to give a prospective buyer that to which he has never had any claim since the earliest days of *common law*.

114 Cong. Rec. 4973 (1968) (Emphasis added). See also 114 Cong. Rec. 2718 (Remarks of Sen. Thurmond), 3135 (Remarks of Sen. Ellender), 3241 (Remarks of Sen. Holland), 3249 (Remarks of Sen. Ervin), 3476-77 (Remarks of Sen. Thurmond), 4063 (Remarks of Sen. Ervin), 4976-77 (Remarks of Sen. Byrd), 4976 (Remarks of Sen. Allott), 4977 (Remarks of Sen. Hansen) (1968).

A witness on behalf of the National Association of Real Estate Boards testified that his organization believed the bill was "repugnant to the principle of private property ownership—a principle whose roots are firmly embedded in the common law."³⁹ Section 1 of the Civil Rights Act of 1866, 42 U.S.C. 1982, was also enacted despite a background of legal concern for the prerogatives of property ownership philosophically at odds with the purposes of that statute. *Jones v. Mayer Co.*, 392 U.S. 409, 449 n. 6 (opinion of Justice Douglas), 473-75 (dissenting opinion of Justice Harlan) (1968). A statute such as Title VIII which so revolutionized common law relationships *ipso facto* created rights which were unknown at common law and which can be enforced without trial by jury.

Despite this radical change in the common law worked by Title VIII, the Court of Appeals held that the rights it created were analogous to the action at law which was available against an innkeeper who refused, without justification, to provide lodgings to a traveler, and held that a jury was therefore available to try the action. (Pp. 62a-63a)

Under the common law of England, an innkeeper was bound to receive and lodge in his inn all travelers and to entertain them at reasonable prices without any special or previous contract, unless he had some reasonable grounds for refusal. *Rex v. Luellin*, [1700] 12 Mod.L.Rep. 445, 88 Eng. Rep. 141 (K.B.).⁴⁰ Because of the scarcity of inns,

³⁹ Hearing Before a Subcommittee of the Senate Banking and Currency Committee, 90th Cong. 1st Sess. 338 (1967).

⁴⁰ See also *Thompson v. Lacy* [1820], 3 B. & Ald. 283, 106 Eng. Rep. (K.B.); *Robins v. Grey* [1895], 2 Q.B. 501; 18 Halsbury, *Laws of England* 141 (2d ed. 1935); *Rex v. Ivens*, [1835], 7 C. & P. 213, 173 Eng. Rep. 94 (N.P.); *Regina v. Rymer* [1877], 2 Q.B.D. 136; *Fell v. Knight* [1841], 8 M. & W. 269 (Q.B.).

the vital importance of the services which they provided travelers, and the unavailability of advance bookings, a legally enforceable duty to serve the public was created by the act of holding one's self out as an innkeeper. *Rex v. Ivens* [1835] 7 C. & P. 213, 219, 173 Eng. Rep. 94, 96 N.P.). The duty of an innkeeper was thus a radical departure from the usual common law rule that a tradesman was free to choose his customers, and was strictly limited.

The innkeeper's duty did not extend to persons who leased lodgings for any extended period of time. Since the keepers of boarding houses, lodging houses, rooming houses and apartment houses did not hold themselves out to the public as providing transient accommodations for travellers, the innkeeper's duty did not apply to them, and they could refuse to serve whomever they pleased. *Thompson v. Lacy*, [1820] 3 B. & Ald. 283, 106 Eng. Rep. 667 (K.B.).⁴¹ One sued for violation of his duty as an inn-

⁴¹ See also *Sealey v. Tandy* [1902], 1 K.B. 296; *Dansey v. Richardson* [1854], 3 E.&B. 144, 159 (Q.B.); *Hundley v. Milner Hotel Management Co.*, 114 F. Supp. 206, 208 (W.D. Ky. 1953), *aff'd mem.*, 216 F.2d 613 (6th Cir. 1954); *Fay v. Pacific Improvements Co.*, 93 Cal. 253, 255, 26 P. 1099, 1100 (1891); *City of Independence v. Richardson*, 117 Kan. 656, 661, 232 P. 1044, 1046 (1925); *Good-year Tire & Rubber Co. v. Altamont Springs Hotel*, 206 Ky. 494, 497, 267 S.W. 555, 556 (1925).

If a traveller remained at an inn and contracted with his host for a term of permanent residence, their relations changed to that of tenant-landlord, and the host was no longer under a duty to accept the lodger. *Alpaugh v. Wolverton*, 184 Va. 943, 948, 36 S.E. 906, 908 (1946); *Shorter v. Shelton*, 183 Va. 819, 822-823, 33 S.E.2d 643, 644-645 (1945).

"The obligation to receive and entertain guests is . . . confined to innkeepers, that is to say, persons who keep inns properly so called, no such obligation resting upon the keeper of a mere lodging-house or a mere boarding house. . . ." 18 Halsbury, *Laws of England* 143 (2d ed. 1935).

keeper to provide accommodations could defend on the ground that he was a landlord who leased property for a term. *Parker v. Flint*, 12 Mod. Rep. 254, 256 (1699) (Holt J.).⁴² The special duty of an innkeeper also did not arise if the would-be guest was not a traveler, but a local resident able to return to his own home. 18 Halsbury, *Laws of England* 144 (2d ed. 1935).⁴³

In many states, race was recognized as a valid reason for refusing accommodation at an inn to a would-be guest. *State v. Steele*, 106 N.C. 766, 11 S.E. 478 (1890); *State v. Hicks*, 174 N.C. 802, 93 S.E. 964 (1917); *Frazer v. McGibbon*, 10 Ont. W.R. 54 (1907); Note, *Hotel Law in Virginia*, 38 Va. L. Rev. 815 (1952); Hartman, "Racial and Religious Discrimination by Innkeepers in the U.S.A." 12 Mod. L. Rev. 449 (1950); Note, *An Innkeeper's 'Right' to Discriminate*, 15 U. Fla. L. Rev. 109 (1962); *Story on Bailments* 486 (4th ed. 1866). Discrimination on the ground of race was likened to the economic discrimination against those travellers who were unable to pay high hotel prices. Cf. *DeWolf v. Ford*, 193 N.Y. 397, 401, 86 N.E. 527, 529 (1908). Although the question of whether a common law innkeeper could discriminate on the ground of race was not unequivocally resolved judicially,⁴⁴ this right of discrimination was

⁴² "The verdict finds he let lodgings only, which shows him not compellable to entertain anybody and that none could come there without a previous contract; that he was not bound to sell at reasonable rates, or to protect his guests."

⁴³ See also *Calye's Case*, 8 Co. 322, 77 Eng. Rep. 520, 77 Eng. Rep. 520 (K.B. 1584); *Rex v. Luellin*, 12 Mod. L. Rep. 445, 88 Eng. Rep. 1441 (K.B. 1700); *Horner v. Harvey*, 3 N.Mex. 307, 5 P. 329 (1885); *Kisten v. Hildebrand*, 48 Ky. 72 (1848); *Brown Shoe Co. v. Hunt*, 103 Iowa 586, 72 N.W. 765 (1897); *Roberts v. Case Hotel Co.*, 106 Misc. 481, 175 N.Y.S. 123 (Sup. Ct. App. Term 1919).

⁴⁴ Cf. *Constantine v. Imperial Hotels Ltd.*, 1 K.B. 693 (1944); *Civil Rights Cases*, 109 U.S. 3, 41 (1883) (Harlan J. diss.); *Christie v. York Corp.*, 1 D.L.R. 81 (1940), *Rogers v. Clarence Hotel*, 2 W.W.R. 545 (1940), *Franklin v. Evans*, 55 O.L.R. 349 (1924), *State v. Steele*, 106 N.C. 766, 11 S.E. 478, 484 (1890).

codified in a number of State statutes. See e.g. Fla. Stat. Ann. § 509.092 (1961); Ark. Stat. Ann. 671-1801 (Suppl. 1961); Del. Code Ann., tit. 24, § 1501 (1953); Miss. Code Ann. § 2046.5 (1959); Tenn. Code Ann. § 62-710 (1955). The innkeeper rule relied on by the Court of Appeals is manifestly inapplicable to a black plaintiff seeking an apartment in the same city in which she already resided.

b. The Relief Available in a Title VIII Case Is Part of a Single Integrated Equitable Remedy

Congress, greatly concerned to erect an effective scheme of enforcement, gave to the district courts in Title VIII actions "a complete arsenal of federal authority." *Jones v. Mayer Co.*, 392 U.S. 409, 417 (1968). The courts were authorized to appoint counsel for indigent plaintiffs, to expedite all related proceedings, to suspend proceedings if administrative conciliation was progressing well, and to award preliminary injunctions, final injunctions, actual damages, punitive damages, costs, and attorneys' fees.⁴² The courts also retain and utilize, as in the instant case, their inherent power to try to effectuate a settlement between the parties.⁴³

These remedies are, in general, not mandatory; injunctive relief and the appointment of counsel are expressly confided to the court's discretion, and section 812(c) provides that the court "may" award punitive damages, actual damages, fees and costs. The court is charged with the responsibility of fashioning from this arsenal such relief in each case as will promote equal access to housing, "a policy that Congress considered to be of the highest priority." *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 311 (1972). The plaintiff in such cases sues,

⁴² 42 U.S.C. §§ 3612, 3614.

⁴³ See p. 47a.

not merely to vindicate a personal interest, but as a private attorney general seeking to carry out that public policy. *Id.* at 211.

The remedial scheme thus created is inherently equitable in nature. The remedy in each case is fashioned so as to promote an end to housing discrimination, not to penalize the wayward or collect any private debt. There is no absolute right to actual or punitive damages such as existed at common law, for these matters are entrusted to the discretion of the court.⁴⁷ "The distinguishing characteristics of legal remedies are their uniformity, their unchangeableness or fixedness, their lack of adaption to circumstances, and the technical rules which govern their use." 1 Pomeroy, *Equity Jurisprudence* § 109 (5th ed. 1941). Equitable remedies, on the other hand, were distinguished by their flexibility and variety. *Alexander v. Hillman*, 296 U.S. 222, 239 (1935). Frequently a district court's decision as to whether or not to allow actual or punitive damages will depend upon its earlier or simultaneous decisions as to whether to award injunctive relief or costs or fees.⁴⁸ Such discre-

⁴⁷ A similar discretion exists under Title VII, where back pay may be denied if there are special circumstances rendering such an award unjust. Compare *Newman v. Piggie Park*, 390 U.S. 400 (1968). Such a case would exist where the defendant's discrimination had been in good faith compliance with an apparently valid state law. See e.g. *Le Blanc v. Southern Bell Telephone & Telegraph Co.*, 333 F. Supp. 602, 610 (E.D. La. 1971), aff'd 460 F.2d 1228.

⁴⁸ In the instant case, for example, the District Court considered among the reasons leading to its decision regarding remedy the fact that the defendants had already suffered a significant financial loss as a result of the preliminary injunction forbidding them from renting the apartment to anyone but plaintiff. P. 51a. See also *Bridges v. Mendota Apartments*, No. 898-H EOH § 17,505 (D.C. Commission on Human Rights, opinion dated November 10, 1972) ("equity demands" assessment of damages where respondent refused to rent apartment and plaintiff had to take another one.) In its findings and conclusions of October 27, 1970, awarding puni-

tionary damages bear little resemblance to damages as they were known at common law, but are quite similar to the damages sometimes given as part of equitable clean up. Ordinarily the remedy fashioned in a Title VIII case will include specific performance of the contract which would have been entered into but for the plaintiff's race, an inherently equitable remedy. *Stewart v. Griffith*, 217 U.S. 323, 328 (1910); *Willard v. Taylor*, 75 U.S. (8 Wall.) 557, 566-68 (1870); *Rutland Marble Co. v. Ripley*, 77 U.S. (10 Wall.) 339, 357-58 (1870).

Congress intended that the forms of relief authorized by Title VIII be employed as part of a single interrelated equitable remedy, and the significance for Seventh Amendment purposes of any relief awarded must be assessed in this context. Where the statute contemplates that actual or punitive damages will only be awarded at the court's discretion and in light of its decisions as to injunctive relief, it would be error to attempt to evaluate the legal or equitable nature of such damages in isolation from such discretion and decisions. In granting relief under the analogous provisions of Title VII, the courts have used great flexibility in devising remedies to eradicate employment discrimination, and this remedial arsenal has been held to be equitable, even when a monetary award is made in a particular case. "The demand for back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy, to be determined through the exercise of the court's discretion and not by a jury." *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1968).⁴⁹ This Court has taken a similar

tive damages but denying actual damages, costs and fees, the court commented, "It probably takes the wisdom of Solomon to decide these cases fairly." P. 51a.

⁴⁹ Accord: *Culpepper v. Reynolds Metals Co.*, 296 F. Supp. 1232, 1241 (N.D. Ga. 1968), rev'd on other grounds 421 F.2d 888 (5th

approach to cases arising under the Fair Labor Standards Act and the Emergency Price Control Act of 1942. See *Yakus v. United States*, 321 U.S. 414 (1944); *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946). Considered as part of a single integrated equitable remedy, the relief in any particular case is *ipso facto* equitable and does not give rise to a right of trial by jury.

e. A Court of Equity Could Constitutionally Award Legal Relief in This Case

Even if the various remedial devices authorized by Title VIII are considered separately, this case is still one properly heard in equity.

The injunctive relief authorized by Title VIII is, historically, purely a matter of equitable cognizance. *Stockton v. Russell*, 54 F. 224, 228 (5th Cir. 1892); *United States v. Debs*, 64 F. 724, 741 (N.D. Ill. 1894); *Fleming v. Peavy Wilson Lumber Co.*, 38 F.Supp. 1001, 1002 (W.D. La. 1941). While damages are the preeminent remedy which was available at law, the fact that damages are available in an action does not make it *ipso facto* a suit at common law.

Cir. 1970); *Hayes v. Seaboard Coast Line Railroad Co.*, 46 F.R.D. 49, 52-53 (S.D. Ga. 1968); *Cheatwood v. South Central Bell Tel. & Telegraph Co.*, 303 F. Supp. 754, 756 (M.D. Ala. 1969); *Smith-Hampton Training School For Nurses*, 360 F.2d 577, 581 n. 8 (4th Cir. 1966).

Cf. Harkless v. Sweeny Independent School Dist., 427 F.2d 319, 324 (5th Cir. 1970), cert. denied, 400 U.S. 991 (1971) (no right to jury trial in suit brought by discharged black school teachers seeking reinstatement and back pay under 42 U.S.C. § 1983):

"Section 1983 was designed to provide a comprehensive remedy for the deprivation of federal constitutional and statutory rights. The prayer for back pay is not a claim for damages, but is an integral part of the equitable remedy of reinstatement. Reinstatement involves a return of the plaintiffs to the positions they held before the alleged unconstitutional failure to sever their contracts. An inextricable part of the restoration to prior status is the payment of back wages properly owing to the plaintiffs. . . ."

At least prior to the promulgation in 1938 of the Federal Rules of Civil Procedure, equity had the power to award monetary relief directly if an accounting were sought, and it could also assess and award damages along with equitable relief to prevent a multiplicity of lawsuits. If a ground for equitable relief existed, equity would not stop with the granting of such relief but would decide all aspects of the controversy, including legal issues. *Parker v. Dee*, 2 Ch. Cas. 200, 22 Eng. Rep. 910 (Ch. 1674); *Whitchurch v. Golding*, 2 P. Wms. 541, 24 Eng. Rep. 852 (Ch. 1729); *Camp v. Boyd*, 229 U.S. 530, 551 (1913); *Mobile v. Kimball*, 102 U.S. 691, 706 (1881); *Gormely v. Clark*, 134 U.S. 338, 349 (1890); *Middletown Bank v. Russ*, 3 Conn. 135 (1819); *Rathbone v. Warren*, 10 N.Y. 587 (1813); 1 *Pomeroy, Equity Jurisprudence* § 237C (5th ed. 1941); James, Civil Procedure 341 (1965). As an incidental part of equitable relief, the Chancellor could determine whether damages should be awarded and, if appropriate, could decree payment. *Clark v. Wooster*, 119 U.S. 322, 325 (1886); *Pease v. Rathbun-Jones Engineering Co.*, 243 U.S. 273, 279 (1917); *Imperial Shale Brick Co. v. Jewett*, 169 N.Y. 143, 62 N.E. 167 (1901); 1 *Story, Equity Jurisprudence* § 161 (14th ed. 1918).

Likewise, the fact that punitive damages were sought and recovered here does not render the suit one at common law. Historically, the inherent authority of a court of equity to award punitive damages was never definitively settled. Cf. *Livingston v. Woodworth*, 56 U.S. (15 How.) 546, 559 (1854); *Colburn v. Simms*, 2 Hare 543, 553-554 67 Eng. Rep. 224, 229 (Ch. 1843); *Karns v. Allen*, 135 Wis. 48, 115 N.W. 357 (1908); *Busby v. Mitchell*, 29 S.C. 447, 7 S.E. 618 (1888), with *Bryson v. Bramlett*, 204 Tenn. 347, 321 S.W.2d 555 (1958); *I.H.P. Corp. v. 210 Central Park South Corp.*, 228 N.Y.S.2d 883, 16 A.D.2d 461 (1962), aff'd

12 N.Y.2d 329, 239 N.Y.S.2d 547, 189 N.E.2d 812 (1963); *Hines v. Imperial Naval Store Co.*, 101 Miss. 802, 58 So. 650 (1911); *Union Oil Co. v. Reconstruction Oil Co.*, 20 Cal. App.2d 170, 66 P.2d 1215 (1937); *International Bankers Life Ins. Co. v. Holloway*, 368 S.W. 2d 567 (Tex. 1963). Where, however, punitive or exemplary damages were authorized by statute, such remuneration was allowed in equity under the theory of equitable clean-up so that a multiplicity of lawsuits would be unnecessary for a suitor to obtain complete relief. *Coca-Cola Co. v. Dixi-Cola Laboratories*, 155 F.2d 59, 64 (4th Cir.), cert. denied 329 U.S. 773 (1946); *Taylor v. Ford Motor Co.*, 2 F.2d 473, 474 (N.D. Ill. 1924); *Brady v. TWA, Inc.*, 196 F. Supp. 504, 505-506 (D. Del. 1961); *William Whitman Co. v. Universal Oil Products Co.*, 125 F. Supp. 137, 162 (D. Del. 1954). Once the jurisdiction of equity attached, it had power to furnish full relief, "to grant everything that might be recovered at law[;] . . . [i]f the facts warranted, exemplary or punitive damages were properly allowed." *Aladdin Mfg. Co. v. Mantle Lamp Co. of America*, 116 F.2d 708, 716 (7th Cir. 1941). In suits for patent infringement, for example, the court could award treble damages since there was explicit statutory authorization for this, *Root v. Railway Co.*, 105 U.S. 189, 205 (1882); *Tilghman v. Proctor*, 125 U.S. 136, 149 (1888); *Birdsall v. Coolidge*, 93 U.S. 64, 69-70 (1877); *Seymour v. McCormick*, 57 U.S. (16 How.) 480, 488 (1853). Even where such infringement suits were tried to a jury, the trial judge rather than the jury was given power to assess punitive damages in appropriate cases. *Day v. Woodworth*, 54 U.S. (13 How.) 363, 372 (1852); *Kennedy v. Lakso Co.*, 414 F.2d 1249, 1254 (3d Cir. 1969); *Randolph Laboratories, Inc. v. Specialties Development Corp.*, 213 F.2d 873, 875 (3d Cir.), cert. denied 348 U.S. 861 (1954); *Swofford v. B. & W. Inc.*, 336 F.2d 406, 412 (5th Cir.) cert. denied 379 U.S. 962 (1964); *See also Keller*

Products, Inc. v. Rubber Linings Corp., 213 F.2d 382, 387 (7th Cir. 1954). *See Shearer v. Porter*, 155 F.2d 77, 83 (8th Cir. 1946) (Assessment of punitive damages under Emergency Price Control Act of 1942 is for judge not jury).

Even if a plaintiff's plea for equitable relief failed, a court of equity would retain jurisdiction to grant damages, especially if the failure of remedy in equity was due to the wrongful acts of the defendant. *Denton v. Stewart*, 1 Cox Ch. 258, 29 Eng. Rep. 1156 (Ch. 1786); *Gulbenkian v. Gulbenkian*, 147 F.2d 173 (CA2 1945); *Gabrielson v. Hogan*, 298 F. 722 (CA8 1924); 1 *Pomeroy, Equity Jurisprudence* § 237 (5th ed. 1941).

Plaintiff's complaint sought relief in the form of an injunction requiring that the disputed apartment be leased to her and punitive damages.⁶⁰ The record demonstrates that her primary concern was to compel the defendants to rent the apartment to her; at the first hearing in this case plaintiff informed the court of her need for the apartment and her desire to move in as soon as possible, and her counsel stated he would be willing to accept the court's suggestion that the case be settled by renting the apartment to Mrs. Rogers.⁶¹ For several months, at the urging of the court, plaintiff continued to try to negotiate such a settlement.⁶² Defendant Leroy Loether adamantly refused to rent the apartment to her, and finally in April of 1970, five months after filing her original complaint, plaintiff—whose previous apartment had been unsanitary and at times without heat and hot water—was compelled to take another apartment and abandon her request for injunctive relief as to the Loether apartment.⁶³ At the hearing on

⁶⁰ Complaint, pp. 5a-6a.

⁶¹ Hearing of November 17, 1969, pp. 9, 10, 14.

⁶² *Id.* at 5, 8, 10, 11.

⁶³ Hearing of April 30, 1970, at p. 2.

final relief in October of 1970 the District Court awarded plaintiff \$250 in punitive damages.⁴³

The instant case presents precisely the sort of situation for which equitable clean up was intended.⁴⁴ The gravamen of plaintiff's complaint and action were for injunctive relief. Defendants' obdurate obstinacy eventually forced plaintiff to accept alternate housing and abandon her equitable claim. Had a court of equity not retained jurisdiction of such a case and awarded punitive or actual damages, the defendants would have succeeded by their stubborn delay in winning a case in which they could not have prevailed in open court. The final hearing on damages was substantially shortened by the court's detailed knowledge of the case acquired at the hearing on plaintiff's motion for a preliminary injunction, a saving not possible if the entire case had had to be tried before a jury.

It is thus clear that, had this case arisen prior to the merger of law and equity, it would have been maintainable

⁴³ Plaintiff's complaint did not seek compensatory damages. See pp. 5a-6a. The District Court's pre-trial orders, however, indicated that such damages were at issue in the case, and directed plaintiff to notify defendants of the nature of her claim and the evidence on which it was founded. Pp. 18a, 22a, 35a, 36a. Plaintiff never complied with this order, and at the hearing of October 26-27, 1970, the District Court ruled inadmissible any evidence of actual damages. Pp. 37a-46a.

At the conclusion of the October hearing the District Court stated "I do not believe there have been any compensatory damages proven in this case or out-of-pocket expenses of that nature." P. 51a. It is unclear whether the Judge so concluded because the evidence offered was insufficient, or because he had ruled it inadmissible. In view of the fact that both punitive and actual damages may be awarded as part of equitable clean-up, the reasons for the District Court's statement are not controlling.

⁴⁴ The Court of Appeals correctly noted that the back pay awarded in Title VII cases is in the nature of restitution, an equitable remedy, and those cases do not depend upon the application of equitable clean up. P. 69a.

at equity and without a right to trial by jury. For many years before that merger, however, courts of equity had declined to exercise their discretionary jurisdiction where the effect of doing so would be to unfairly deprive a litigant of his procedural rights in an action at law. In *Welby v. John Duke, of Rutland* the petitioner brought a bill in Chancery to compel the respondent to abandon claims, and to discover and preserve the respondent's evidence of title and to adjudicate that title and enjoin respondent from claiming any right to the land [1773]. 2 Brown C. & P. 39, 1 English Reports 778 (K. B.). While a simple bill to perpetuate evidence was unobjectionable in equity, courts of equity had refused to entertain bills to establish a legal title. The court in *Welby* dismissed the bill on the ground, *inter alia*, that to do otherwise "would be subversive of the legal and constitutional distinctions between the different jurisdictions of Courts of Law and Equity." 1 Brown C. & P. at 42, 1 English Reports at 780.

The equitable doctrine announced in *Welby* was given added impetus in American courts by the enactment of the Seventh Amendment. In *Hipp v. Babin*, 60 U.S. 19 (1857) this Court, relying on *Welby*, denied equitable jurisdiction to an action to recover land, cognizable at law as ejectment, to which had been joined several incidental equitable claims of dubious merit. The Court ruled that, whenever a plaintiff had a remedy at both law and equity, he must proceed at law because of the defendant's constitutional right to a jury trial. In the cases which followed, this Court in denying equitable jurisdiction relied upon, without distinguishing as to import, the policy of *Hipp*, Section 16 of the Judiciary Act of 1789 prohibiting suits at equity "where plain, adequate and complete remedy may be had at law," the equitable maxim to the same effect, and the Seventh Amendment. *Whitehead v. Shattuck*, 138 U.S. 146 (1891);

Scott v. Neely, 140 U.S. 106 (1891); *Cates v. Allen*, 149 U.S. 451 (1893); *Hale v. Allinson*, 188 U.S. 56 (1903). The reach of this doctrine was restricted by the limits inherent in legal remedies; when a case involved a substantial equitable claim as well as legal issues, the inability of a court of law to provide such equitable relief was an insurmountable procedural obstacle to the granting of a jury trial. *Ross v. Bernhard*, 396 U.S. 531, 542 (1970). The equitable cleanup doctrine retained its vitality in the face of *Hipp* and *Scott* because it dealt with cases involving a substantial equitable issue for which no adequate remedy existed at law. So long as law and equity were kept separate, equitable cleanup cases were completely consistent with the policies being pursued in *Hipp* and *Scott*.

In 1938, however, law and equity were merged by the Federal Rules of Civil Procedure, precipitating an unavoidable conflict between these two lines of cases. Since equitable remedies technically became available in any action tried before a jury, in virtually every case an adequate remedy existed at law. The statutory requirement that such cases be tried at law was repealed,^{**} but the equitable maxim and the policy first announced in *Welby* and *Hipp* remained. This equitable policy clearly militated in favor of taking advantage of the merger of law and equity to extend jury trials to all cases raising legal issues, regardless of whether they might be incidental to equitable claims. The meaning of the Seventh Amendment, however, was not changed by the new Rules, and its literal requirements could no more be added to than reduced by any act of Congress or rules promulgated pursuant thereto. It remained for this Court to decide whether the federal courts should exercise their traditional discretion to refuse to hear as equitable actions cases involving both legal and equitable issues,

^{**} 28 U.S.C. § 384 was repealed in 1948.

thus requiring those cases to be tried at law with an ensuing right to a jury trial on the legal issues.

In *Beacon Theatres v. Westover* the Court concluded that such an exercise of discretion was appropriate. Assuming *arguendo* that, in a traditional sense, the legal issues in case were incidental to the equitable issues, the Court held that equity's practice of deciding legal issues once it obtained jurisdiction had to be re-evaluated in the light of the liberal joinder provisions and merger of law and equity worked by the Federal Rules. 359 U.S. 509 (1959). Although the case in *Beacon Theatres* might have been heard at equity and without a jury trial prior to the Rules, the Court held that a jury trial should be provided. In *Dairy Queen v. Wood*, 369 U.S. 469 (1962), two admittedly equitable counts were joined with a claim for an "accounting," a traditional equitable remedy. An accounting was available at equity in situations so complicated that only a court of equity could unravel them. While *Dairy Queen* might have been such a case a century before, the power of district courts to appoint masters to assist juries greatly reduced the necessity for this equitable remedy as it had for cleanup. Federal Rule of Civil Procedure 53(b). Thus, as in *Beacon Theatres*, the court could exercise its discretion to order a jury trial without denying the plaintiff an adequate remedy. *Ross v. Bernhard* combined an equitable doctrine of standing, permitting stockholder derivative actions, with a legal claim being asserted on behalf of the corporations. Prior to 1938 equity had to retain jurisdiction over such a case, since a stockholder had no remedy at law. The merger of law and equity permitted the Court to provide the equitable remedy of a derivative action in a case to be tried as one at law and before a jury. 396 U.S. 531 (1970).

Beacon Theatres and its progeny, however, were not constitutional decisions, at least not in the sense involved in

Marbury v. Madison, 1 Cranch (U.S.) 137 (1803). The right to a trial by jury in those cases derived from the decision of Congress to merge law and equity through the Federal Rules. That right would cease to exist if Congress once again divided law and equity. A right conferred by the Constitution, on the contrary, is "a superior law, unchangeable by ordinary means" and is not "alterable when the legislature shall please to alter it." *Marbury v. Madison*, 1 Cranch (U.S.) at 177. The decisions at issue since 1938 repeatedly refer to this non-constitutional basis.⁵⁷ In *Beacon Theatres* the Court held that a jury trial was required "under the Declaratory Judgment Act and the Federal Rules of Civil Procedure," 359 U.S. at 506, in view of the "long-standing principle of equity" that jury trials should be afforded whenever possible. 359 U.S. at 510. The Declaratory Judgment Act and Federal Rules were said to affect "the scope of equity," 359 U.S. at 509, not the meaning of the Constitution. In *Dairy Queen* the Court said that cases in which an equitable accounting might be had for complicated financial problems would be rare in view of the provisions of Rule 53(b) authorizing the appointment of a master to assist a jury. 369 U.S. at 478. In *Ross v. Bernhard* the Court stressed that stockholder derivative actions could be tried to juries because "[a]fter adoption of the rules there is no longer any procedural obstacle to the assertion of legal rights before juries...." 396 U.S. at 542.⁵⁸

⁵⁷ This characterization of these decisions as an equitable doctrine is not without exception. *Ross* in particular contains a significant amount of constitutional language. 396 U.S. at 533-35, 538, 542.

⁵⁸ Each of these cases involved the danger that circumstances might have been manipulated to defeat the right to jury trial. In *Beacon Theatres* the plaintiff had attempted to sue in equity rather than waiting to be sued at law. 359 U.S. at 504. In *Dairy Queen* the plaintiff tried to characterize a contract action as an accounting. 369 U.S. at 477-78. In *Ross* it was the plaintiff stockholders who sought a jury trial, which would have been mandatory if re-

In view of this non-constitutional basis of *Beacon Theatres* and its progeny, it could have been anticipated that this line of cases would not be applied where Congress expressly commanded non-jury trials. Such a statutory provision would only be invalid if it interfered with the jury trial right provided by the Seventh Amendment itself, not merely the broader right enforced by equity since 1938. That question was presented to this Court in *Katchen v. Landy*, 382 U.S. 323 (1966), where a claimant maintained he had a constitutional right to a jury trial despite the contrary provision of the bankruptcy laws.⁶⁹ Noting that the rule in *Beacon Theatres* and *Dairy Queen* was "an

questioned by the corporation whose officers, plaintiffs alleged, were controlled by the defendant. 396 U.S. at 531. No such manipulation is involved here.

⁶⁹ Six years before *Katchen* the Court sanctioned the use of equitable clean-up to award damages without a jury in a case arising under the Fair Labor Standards Act. *Mitchell v. De Mario Jewelry*, 361 U.S. 288 (1960). In that case section 17 of the Act gave to the district courts jurisdiction to "restrain" violations of the Act, an authorization of equitable relief contemplating a judge sitting without a jury. This Court interpreted the law to authorize the same judge to order reimbursement of lost wages. 361 U.S. at 289-296. Three members of the Court dissented, urging such wages should be recovered only in an action under section 16 of the Act, which the dissenters construed as affording a defendant a jury trial. 361 U.S. at 303. The dissenters agreed "that an equity court, proceeding under unrestricted general equity powers, may decree all the relief, including incidental legal relief, necessary to do complete justice between the parties," 361 U.S. at 299, and did not question the constitutionality of a statute authorizing the granting of such incidental legal relief without a jury trial. 361 U.S. at 299.

In *Ross v. Bernhard* the Court noted that the unavailability of equitable relief in a court of law prior to 1938 constituted a "procedural obstacle" to the expansion of the right to jury trial worked by *Beacon Theatres* and its progeny. 396 U.S. 531, 542. Any such procedural obstacle to the exercise of a constitutional right would, except in the most compelling circumstances, be invalid. The constitutionality of this obstacle was never questioned by this Court, before or after the promulgation of the Federal Rules in 1938.

equitable doctrine," 382 U.S. at 339, the Court concluded that the delay and expense of a jury trial would be inconsistent with the purposes of the Bankruptcy Act. The Court stressed that in *Katchen*, unlike *Beacon Theatres* and *Dairy Queen*, Congress had expressed its will in "a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury." 382 U.S. at 339. The Court concluded that it should uphold the power of the bankruptcy court to summarily adjudicate a claim in order to "implement congressional intent." 382 U.S. at 340.

Katchen is dispositive of the instant case. The draftsmen of Title VIII were greatly concerned to devise an effective method of enforcement, particularly in view of the failure of many state laws to accomplish the same goal of open housing.⁶⁰ Speed of enforcement was acknowledged to be a key problem, because once a home or apartment had been sold or leased to another person the statutory purpose would be largely frustrated.⁶¹ To assure such effective enforcement, Congress provided district judges with an unprecedented array of remedial devices, and

⁶⁰ See, e.g., Hearings Before the Subcommittee on Housing and Urban Affairs of the Senate Banking and Currency Committee, 90th Cong., 1st Sess., 15-16, 20, 26 (remarks of Attorney General Clark); 33 (remarks of Secretary Weaver); 50 (remarks of Senator Proxmire), 60-72 (memorandum on state laws), 73 (remarks of Senator Mondale), 81 (statement on behalf of U.S. Civil Rights Commission), 99 (remarks of Roy Wilkins), 165 (remarks of Louis Pollak), 175 (remarks of Algernon Black), 217 (remarks of Edward Rutledge), 361 (remarks of Jacob Rudid) (1967); Hearings Before a Subcommittee of the House Judiciary Committee, 89th Cong. 2d Sess. 1054 (Message From President Johnson) (1967).

⁶¹ See, e.g., Hearings Before the Subcommittee on Housing and Urban Affairs of the Senate Banking and Currency Committee, 90th Cong., 1st Sess., 15-16 (Remarks of Attorney General Clark), 473-4 (letter from Pennsylvania Human Relations Commission) (1967); Hearings Before a Subcommittee of the House Judiciary Committee, 89th Cong. 2d Sess. 1309-10 (remarks of Attorney General Katzenbach) 1306 (remarks of Secretary Weaver) (1967).

broad discretion in their employment. See pp. 36-37, *supra*. Congress directed that the case be set for hearing "at the earliest practicable date" and "be in every way expedited." 42 U.S.C. §3614. To impose in Title VIII cases the delay, expense, and possible prejudices of a jury would be to dismember this carefully devised Congressional scheme. *Katchen v. Landy*, 382 U.S. at 339. A strong presumption of constitutionality attaches to any Federal statute such as Title VIII which effectuates important public policies, *United States v. Di Re*, 332 U.S. 581, 585 (1948); no such presumption or policies were involved in *Beacon Theatres*, to decline to exercise jurisdiction over cases traditionally *Dairy Queen* or *Ross*. Courts of equity have no discretion within their authority when Congress directs that such cases not be tried at law. If a jury were required by the Seventh Amendment, of course, it could not be avoided by such Congressional intent. But no such result was required by the Seventh Amendment before 1938, and the meaning of the Constitution was not changed by the promulgation of the Federal Rules of Civil Procedure.

CONCLUSION

Section 812(c) provides that cases arising under Title VIII shall be tried by a judge without a jury. This requirement is an essential part of the enforcement measures devised by Congress to effectuate the national policy of open housing pursuant to the Thirteenth and Fourteenth Amendments. Since the rights enforced in such cases were unknown at common law, and since the remedy involved is inherently equitable, section 812(c) is constitutional.

For the foregoing reason, the judgment of the Court of Appeals should be reversed.

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IN THE

MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-1035

JULIA ROGERS,

Petitioner,

v.

LEROY LOETHER and MARIANNE LOETHER,
his wife, and MRS. ANTHONY PEREZ,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

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ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS

QUESTION PRESENTED

Whether the Seventh Amendment entitles a party to a jury trial in a civil action in a United States District Court for compensatory and punitive damages under Section 812 of the Civil Rights Act of 1968.

STATEMENT OF THE CASE

On November 7, 1969, the plaintiff, Julia Rogers, by her counsel, Milwaukee Legal Services, commenced a civil action in the United States District Court for the Eastern District of Wisconsin under the private enforcement provisions of the Civil Rights Act of 1968. The complaint was based on events which had occurred within the week immediately preceding the date of filing. Prior to the initiation of the civil action there had been no application to the Secretary of Housing and Urban Development for assistance in obtaining voluntary compliance with the Act under the provisions of sections 810-811.

The plaintiff initially sought punitive damages and injunctive relief and then, when the issues were being formulated for trial, interjected a claim for her actual damages. (18a). There was no request for a permanent injunction in the complaint and none was ever sought in the course of the proceedings. Judge Reynolds granted a preliminary injunction enjoining the defendants from renting the apartment in question after conducting a hearing on November 20, 1969. Neither the plaintiff nor Judge Reynolds ever pressed for the rental of the apartment to Mrs. Rogers after the injunction was entered.

The defendants' request for jury trial was contained in their answer. During the pre-trial conference held on January 5, 1970, District Judge Reynolds, *sua sponte*, challenged the defendants' right to a jury and his pre-trial order directed them to submit authorities in support of their right to a jury unless they withdrew their jury demand. (18a-19a).

Following the submission of authorities by both the plaintiff and defendants, arguments were heard on the

issue on April 30, 1970. On this occasion the plaintiff's counsel confirmed that the plaintiff had obtained other housing and consented to the dissolution of the preliminary injunction. (Hearing of April 30, 1970, p. 3). Defendants' counsel reiterated their offer, which had been made at the January 5, 1970 pre-trial conference, to rent the apartment in question to any Negro family. (Hearing of April 30, 1970, p. 3). Judge Reynolds had strongly urged plaintiff's counsel to recommend acceptance of the defendants' proposal to the plaintiff and on April 30, 1970 he stated that the defendants' offer satisfied the purpose of the statute which was to open up housing to Negroes. He further observed that punitive damages would be inappropriate in the case because of the defendants' offer and that the only issue remaining for trial was the amount of the actual damages. (Hearing of April 30, 1970, p. 4).

The case was tried before Judge Reynolds on October 26 and 27, 1970. The entire testimony given on direct examination at the time of the trial on behalf of the plaintiff related to her claim for actual-compensatory damages.

At the close of the trial the court announced its conclusion that the apartment was not rented to the plaintiff because of her race and also found that no compensatory damages had been proven. (Trial of October 26-27, 1970, p. 210). However, the court did award \$250 in punitive damages and denied the plaintiff's request for an award of attorneys' fees and costs. The judgment embodying the court's decision on the issues was entered December 7, 1970.

The Seventh Circuit reversed, holding that defendants' jury trial demand should have been granted because the

action was in the nature of a suit at common law and, hence, within the purview of the Seventh Amendment.

SUMMARY OF ARGUMENT

I. A. Congress did not specify how issues of fact were to be tried in private actions under section 812 of the 1968 Act. It did choose to denominate the proceeding as a "civil action" and the use of this term of art strongly indicates that the action is to be more in the nature of an ordinary lawsuit than some hybrid proceeding in which a jury trial would be out of place.

B. The nature and purpose of the Civil Rights Act of 1968 give rise to conflicting policy considerations on the use of juries to decide the factual issues in an action based on alleged racial discrimination. Although the plaintiff fears the prejudices of a jury drawn from the community, the Seventh Circuit in the instant case recognized that ". . . the desirability of broadening lay participation in judicial implementation of civil rights" constituted a valid policy consideration favoring use of juries in these cases. *Rogers v. Loether*, 467 F. 2d 1110, 1123.

The recent sweeping revisions of the federal law of jury selection and service should neutralize, at least for the present, the expressions of concern in Congress relating to jury biases. Congress acted on this concern in an elaborate fashion with the Jury Selection and Service Act of 1968 and the further amendment in 1972 and its actions should not be presumed inadequate. Rather the Court should recognize that the new legislation to insure that federal juries are drawn from a fair cross-section of the community, with racial discrimination forbidden, eliminates the fear of jury bias as a policy con-

sideration and leaves the Seventh Amendment question to be squarely faced.

II. A. The Seventh Amendment to the Constitution provides that in "suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The decisions of this court demonstrate that the Seventh Amendment right applies to all actions which are analogous to those which were tried to a jury under the English common law in 1791 when the amendment was adopted. *E.g., Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830). The preservative power of the Seventh Amendment reaches all suits in which legal rights are to be decided, not merely those suits which were among the common law's "old and settled proceedings." 28 U.S. 447.

When Congress enacts a new statutory cause of action and nothing is said about how issues of fact are to be decided, the right to jury trial is resolved by reference to the new action's closest historical analogy. *Ross v. Bernard*, 396 U.S. 531, 543, n. 1. In the course of seeking the appropriate analogue the common law is not to be viewed restrictively so as to deny the right to jury trial in actions which did not exist under the same nomenclature in 1791 or which would have been out of keeping with the common law of that time. Rather jury trial is protected whenever legal as opposed to equitable rights are to be enforced. Most recently this Court has suggested that the process of determining the "legal" nature of an action should include three considerations: (1) the custom with reference to such questions before the merger of law and equity in 1938; (2) the remedy sought; and (3) the practical abilities and limitations of juries. *Ross v. Bernard*, 396 U.S. 531, 583, n. 10.

B. (1) The action in the instant case was essentially a suit to recover money damages for the harm allegedly inflicted by the defendants in the course of committing a civil wrong against the plaintiff. At the time of trial the only issues of fact were whether the Loethers denied the rental of their apartment because of Mrs. Rogers' race and the extent of Mrs. Rogers' actual damages. There was no claim for any equitable relief at the time the availability of a jury trial was critical.

Several historical analogues at common law are available to this new statutory cause of action. The Seventh Circuit suggested suits against innkeepers for wrongfully refusing service when it was available, suits for defamation and the intentional infliction of emotional distress. *Rogers v. Loether*, 467 F. 2d at 1117-1118. In a similar action under the 1968 Act in district court in Nevada a number of other historical counterparts were identified. *Kastner v. Brackett*, 326 F. Supp. 1151, 1152 (D.C. Nev. 1971). The ready availability of these analogues confirms the "legal" nature of the instant case under the first test recommended in *Ross*.

(2) The test of the remedy sought was most compelling of the application of the Seventh Amendment right in *Ross* because the claim was for money damages. So also should it be compelling herein. The only relief sought on the day of trial, other than costs and attorneys' fees, was money damages — both compensatory and punitive. Even the plaintiff concedes that money damages constituted the pre-eminent remedy available at law. Petitioner's Brief, p. 39. Although juries have traditionally been called upon to decide the proper measure of compensatory damages the process of determining whether and the extent to which punitive damages should be

levied against the defendant depends even more on the collective judgment provided by a jury.

(3) Although this court did not explicitly apply the test of the "practical abilities and limitations of juries" in *Ross*, it can be regarded as including the considerations of whether a jury can be expected to deal competently with the factual issues which a particular case will present and whether the intervention of a jury trial will be disruptive of the Congressional scheme devised to administer its new statutory cause of action. The factual issues presented in actions under section 812 will require weighing the credibility of witnesses, discerning the true motivation of the defendant and measuring the damages of the plaintiff. All of these are tasks for which juries have always been regarded as competent and dependable.

The question of whether a jury trial would disrupt a statutory scheme was presented to this court in *Katchen v. Landy*, 382 U.S. 323 (1966). In that case the issue was the availability of a jury in a summary proceeding which was designed for quick and binding disposition of creditors' rights under the Bankruptcy Act. In the course of deciding that a court of bankruptcy had jurisdiction in the particular case to dispose of the claim without a jury, the court distinguished the plenary proceeding where a jury trial would be available. 382 U.S. 328. An analysis of the "civil action" authorized under section 812 of the 1968 Act reveals it is much more akin to the plenary proceeding than to the summary proceeding in *Katchen*. Hence the reasons given in *Katchen* for denying a jury, including the concern for the special statutory scheme, have no application in the instant case where Congress has authorized a "civil action."

f

ARGUMENT

I. THE CIVIL RIGHTS ACT OF 1968 DOES NOT SPECIFY HOW ISSUES OF FACT SHALL BE TRIED IN CIVIL ACTIONS BROUGHT IN DISTRICT COURT UNDER SECTION 812; THEREFORE, THE AVAILABILITY OF JURY TRIAL IS TO BE DECIDED BY REFERENCE TO THE SEVENTH AMENDMENT.

A. Use of the Term "The Court" Is Not Conclusive That Congress Intended the Trier of Fact to be a Judge Without a Jury.

The language of section 812 of the Civil Rights Act of 1968 does not compel the conclusion that Congress intended these civil actions to be tried by a judge alone. The statute merely identifies "the court" as the source of any final judgment awarding relief and it is arbitrary to assume that "the court" means "chancellor acting without a jury", particularly when the proceeding authorized by the statute in a "civil action."¹ A "civil action" is the ordinary type of lawsuit conducted in federal district courts under the Federal Rules of Civil Procedure where all claims — equitable and legal — may be joined.² The term "civil action" is a well recognized term of art and has been taken from the Federal Rules of Civil Procedure for use in other statutes with the understanding by the draftsmen that the right of jury trial would exist.³

¹ The term "the court" is frequently used in statutes in a sense that cannot be construed to mean the judge alone. Comment, *The Seventh Amendment and Civil Rights Statutes: History Adrift in a Maelstrom*, 68 Nw. U. L. Rev. —, number 3, n. 144 (1973).

² Fed. R. Civ. P. 2, 18.

³ *Kennedy v. Lakso Company, Inc.*, 414 F. 2d 1249, 1252 (3d Cir. 1969).

The court of appeals carefully considered the argument, which had been adopted by the district court, that a fair construction of the statute excluded a trial by jury. But that construction was ultimately rejected in view of the provision in the private enforcement provision of the Fair Housing Act for both actual damages and punitive damages which would normally contemplate a finding by the jury as to the appropriate measure of these damages.³ The court of appeals also recognized that it would be highly unusual for a federal statute to authorize the imposition of punitive damages to the extent of \$1,000 without also according the right to trial by jury to the defendant against whom such a penalty might be enforced.⁴

Even if the Act can be fairly construed to mean that the factual issues in all private enforcement actions must be tried by a judge without a jury, the constitutionality of the statute under the Seventh Amendment must be resolved.⁵ This the plaintiff concedes.⁶

B. There Are No Overriding Policy Considerations Identified by Congress in Connection With the Civil Rights Act of 1968 That Would Exclude Jury Trials.

The court of appeals found no legislative history which was useful on the question of the right to a jury trial in section 812 actions.⁷ There were no committee reports reflecting any consensus on the issue and what little testimony there is available by the proponents of the Act at the hearings reflects an assumption that where only dam-

³ 467 F. 2d 1110, 1122-1123 (1972).

⁴ *Id.* at 1123.

⁵ *Minneapolis and St. Louis Railroad v. Bombolis*, 241 U.S. 211, 219.

⁶ Petitioner's Brief, p. 7.

⁷ 467 F. 2d 1110, 1123.

ages are sought, which was the exact status of this case at the time of trial, the case would be tried to a jury.⁸

Although there have been expressions of concern regarding the possible disinclination of juries to render verdicts in keeping with the law, nevertheless there are policy considerations consistent with the purpose of the 1968 Act which weigh in favor of submitting these issues to a jury. One such policy consideration would lie in the desirability of exposing to a wider section of the public, which a jury panel would represent, the meaning of the law against racial discrimination and its force and effect in the area of housing.

There is no evidence to which the plaintiff can point which demonstrates that a properly instructed panel of jurors, having been carefully examined as to their qualifications and biases by the attorneys and/or the judge pursuant to Rule 47, will refuse to return verdicts consistent with the facts and the law. All that is available is speculation that jurors, and perhaps only those in certain parts of the country, will be hostile to lawsuits brought on the basis of alleged racial discrimination. Unless there is some objective evidence that jurors are unworthy of having these questions entrusted to them, there is no justification for withholding such matters on the basis of the belief by some that impartial verdicts cannot be rendered. In this connection it may be recalled that before the recent series of Black Panther trials began, some interested sections of the public prophesied that those blacks could not get fair and dispassionate

⁸ Hearings on S. 3296 before the Subcommittee on Constitutional Rights of the Senate Committee on Judiciary, 89th Cong., 2nd Sess., pt. 2, 1178 (1966).

juries. However, this conventional wisdom did not survive the verdicts which were rendered.⁹

Although some lip service is paid to the techniques at trial which are available to purge a jury panel of prejudice and biases, the plaintiff does not even discuss the recent actions of Congress aimed at the earliest stages of jury selection. The Jury Selection and Service Act of 1968 by its prohibitions against racial, ethnic and economic discrimination now substantially insures that a cross-section of the public will file into the courtroom at the commencement of trial.¹⁰ In 1972 Congress further amended 28 U.S.C. § 1863 to specify the process by which a random selection of members of the jury panel is guaranteed.¹¹ It would be very unusual for this Court to adopt an argument to the effect that these recent enactments by Congress were ineffective to accomplish their purpose and that federal jury panels still could not be trusted with sensitive matters. It is altogether more appropriate to conclude that since Congress has now acted out of its concern for insuring representative jury panels that this Court may properly disregard the Congressional expressions of concern for jury impartiality, cited by the plaintiff, which preceded the new, sweeping revisions of the federal law of jury selection and service.

⁹ See M. Kempton, *The Briar Patch, The People of the State of New York v. Lumumba Shakur, et al.*, (1973); E. Kennebeck, *Juror Number Four*, (1973).

¹⁰ Act of March 27, 1968, Pub. L. 90-274, § 101, 82 Stat. 54, 28 U.S.C. 1862.

¹¹ Act. of Apr. 6, 1972, Pub. L. 92-269, § 2, 86 Stat. 117, 28 U.S.C. 1863.

II. THE SEVENTH AMENDMENT PRESERVES THE RIGHT TO JURY TRIAL TO PARTIES IN CIVIL ACTIONS FOR DAMAGES BROUGHT UNDER SECTION 812 OF THE CIVIL RIGHTS ACT OF 1968.

A. The Seventh Amendment Preserves the Right to Jury Trial to All Actions in the Nature of a Suit at Common Law.

The Seventh Amendment to the Constitution provides that in "Suits at common law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved." The amendment has been construed to preserve the right to a jury trial as it existed under English common law when the amendment was adopted in 1791.¹² The classical definition of the area within the purview of the Seventh Amendment was by Justice Story in *Parsons v. Bedford*:

"By common law (the framers of the Constitution) meant . . . not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law in equity, was often found in the same suit. . ." 28 U.S. (3 Pet.) 433, 447 (1830).

The constitutional test which has evolved depends upon an analysis of the proceeding in question and a search for the nearest historical analogue to be found in the pro-

¹² *Shields v. Thomas*, 1 U.S. (18 How.) 209, 216 (1855); *In re Wood*, 210 U.S. 246, 258 (1908); *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935); *Baltimore and Carolina Line, Inc. v. Redmen*, 295 U.S. 654, 657 (1935).

cedures which existed at common law. When a new cause of action is created by Congress and nothing is said about how the issues of fact are to be tried, as is the case with the 1968 Act, the jury trial issue is to be determined by fitting the cause to the nearest historical counterpart.¹³

An analysis of the instant case reflects that both equitable and legal types of relief were sought at the outset. The original prayer for relief asked for a temporary restraining order, a preliminary injunction and punitive damages. (6a). The request for actual damages became a part of the case after the first pre-trial conference. (18a). For reasons to be elaborated later in this Brief, the claims for money damages were unquestionably "legal" in nature. The principle that a party cannot be deprived of his constitutional right to a jury trial by a joinder of prayers for both legal and equitable relief has long been established. Both Justice Black and Justice Harlan referred in *Dairy Queen v. Wood*, 369 U.S. 469, to the 1891 decision of *Scott v. Neely* where this principle was recognized.¹⁴

After the adoption of the Federal Rules of Civil Procedure in 1938 federal courts were permitted, under Rule 18(b), to entertain an action in which both legal and equitable claims were advanced by the plaintiff. A practice developed after the merger, however, to use this jurisdiction over both types of claims to diminish the availability of jury trials. The practice was one whereby any

¹³ *Luria v. United States*, 231 U.S. 9, 27-28 (1913); *Ross v. Bernard*, 396 U.S. 531, 543 n. 1. This procedure is well recognized and accepted by the commentators. 5 Moore, para. 38.11(7); James § 8.6; Wright and Miller § 2316, at 79.

¹⁴ 369 U.S. 471, 481.

issue common to both the legal and equitable claims was tried first to the court, thereby foreclosing the right to trial by jury on the common issues by way of collateral estoppel.¹⁵

That practice was at issue before the court in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). The holding in *Beacon Theatres* was that in a case uniting an equitable and a legal claim, the right to jury trial could not be lost by the sequence in which the claims were decided.¹⁶ This is fundamentally an affirmation of the principle of *Scott*, reconfirmed in the setting of the new, merged procedure under the Federal Rules of Civil Procedure. The principle—that the right to jury trials should not be diminished by reason of a blending of legal claims with equitable claims—remained unchanged.¹⁷

In *Dairy Queen v. Wood*, this court was confronted with the argument that the right to jury trial could be

¹⁵ See *Dairy Queen v. Wood*, 369 U.S. 469, 472.

¹⁶ 359 U.S. 500, 501-511.

¹⁷ *Dairy Queen v. Wood*, 369 U.S. 469, n. 5. It appears that the merger of law and equity may have aggravated the process of ascertaining the extent of the Seventh Amendment right. Questions have been raised as to whether *Beacon Theatres* and *Dairy Queen*, while guarding against practices that tend to diminish the Seventh Amendment right, might also by their logic open the way for an improper diminution of equity's concurrent jurisdiction. (J. Moore, *Federal Practice Rules Pamphlet*, 810-811 (1971); *Ross v. Bernard: The Uncertain Future of the Seventh Amendment*, 81 Yale L.J. 112 (1971). There is no threat to reduce equity's jurisdiction when, as here, there is no claim for equitable relief at the time the availability or nonavailability of a jury trial becomes critical.

denied whenever the legal issues were "incidental" to the equitable issues. The plaintiff sued on an alleged breach of a contract for the use of the "Dairy Queen" trademark and requested (1) temporary and permanent injunctions; (2) an accounting of and judgment for money owing under the contract; and (3) an injunction pending the accounting to prevent the defendant from collecting money from "Dairy Queen" stores during the action. The court rejected the "incidental" argument out of hand and went on to emphasize that in *Beacon Theatres* it was held that where both legal and equitable issues were presented in a single case, "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."¹⁸

The legal claims in the instant action insure a jury trial under the principles of *Beacon Theatres* and *Dairy Queen* while the absence of equitable claims at the time of trial renders our case easier to decide. Unlike *Dairy Queen* there was no request for a permanent injunction herein and all of the equitable-injunctive relief had been granted on the basis of a non-binding decision on the merits well before trial. Unlike *Beacon Theatres* there was no potential for depriving the defendants of their right to a jury on the legal claim involving damages by having the common issues tried first by the judge because the plaintiff had voluntarily relinquished any claim for equitable relief well in advance of trial. For the same reason it is impossible to characterize the claim for damages as "incidental" to the equitable claims.

¹⁸ 369 U.S. 472-73.

B. A Civil Action for Damages on the Basis of Racial Discrimination Against the Plaintiff in the Rental of Housing is in the Nature of a Suit at Common Law.

1. The closest historical analogues to this action are actions at common law where jury trial was available.

The search for appropriate historical analogues is guided by Justice Story's definition of the reach of the Seventh Amendment to the effect that it:

“...embraces all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they assume to settle legal rights.”¹⁹

From this it is apparent that the Seventh Amendment protects jury trial for legal claims in whatever context they might be litigated. It does not aid analysis to argue, as does the plaintiff, that in the Civil Rights Act of 1968 we are faced with an entirely new cause of action, or that there was no mention of a right of action for racial discrimination in 1791. Under the historical test . . . “(t)he modern action and its ancient equivalent need not be identical.”²⁰ The “literal” approach is particularly artificial in view of the analytical process exemplified by the Seventh Circuit when it found several historical common law counterparts to the statutory proceeding brought by the plaintiff in this case.²¹

In *Ross v. Bernard* three specific criteria were identified which may be used to resolve the Seventh Amend-

¹⁹ *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830).

²⁰ *Ochoa v. American Oil Co.*, 388 F. Supp. 914, 916 (S.D. Tex. 1972).

²¹ 467 F. 2d 1110, 1117.

ment question with regard to a particular action. Consideration is to be given to:

- (1) the pre-merger custom with reference to such questions;
- (2) the remedy sought; and
- (3) the practical abilities and limitations of juries.²²

It was conceded that the first test, . . . "requiring extensive and possibly abstruse historical inquiry", was the most difficult to apply.²³ Nevertheless appropriate historical analogues to the plaintiff's claim in this lawsuit are readily apparent.

This case is in the nature of a tort action — damages are sought to compensate the plaintiff for the harm done by alleged "civil wrong." The Seventh Circuit recognized that the particular "civil wrong" alleged in this action was analogous to common law actions for defamation and infliction of emotional harm.²⁴ The right to be free from harm caused by infliction of mental or emotional indignity was conceived at common law and has been steadily expanded.²⁵ Professors Gregory and Kalven have suggested that this growth in the common law has developed to the point of providing relief for harm occasioned by racial discrimination.²⁶

²² *Ross v. Bernard*, 396 U.S. 531, 538 n. 10.

²³ *Id.*

²⁴ 467 F. 2d 1110, 1117.

²⁵ C. Magruder, *Mental and Emotional Distress in the Law of Torts*, 49 Harv. L. Rev. 1033 (1936).

²⁶ Gregory and Kalven, *Cases and Materials on Torts*, 961 (2d ed. 1969).

In a case virtually identical to ours in that the plaintiff sought damages under the Civil Rights Act of 1968, a district court judge discerned that:

"The instant action is one traditionally legal in character. From one point of view, it is an action on an oral contract for damages for its breach, a common law action on the case for assumpsit alleging the breach of the landlord-tenant relationship by an eviction dictated by racial discrimination. From another aspect, emphasizing the allegedly false reasons given to justify the eviction, it is like a common law action on the case for deceit." *Kastner v. Brackett*, 326 F. Supp. 1151, 1152 (Nev. 1971).

In *Kastner* the plaintiffs who were seeking to have the jury trial demand stricken cited Judge Reynolds' decision in *Rogers* as authority. District Judge Thompson recognized that *Rogers* was squarely in point but rejected it because, ". . . the *Rogers* decision does not comport with my understanding of the constitutional right to a jury trial."²⁷ The motion to strike the jury demand was denied.²⁸

The number of historical analogues identified by the Seventh Circuit and the district court for Nevada suggests that the first test proposed in *Ross* is not as difficult to apply, at least in these actions, as was predicted. In any case, it appears that the "legal nature" of the case is readily discernable from a historical point of view.²⁹

2. The remedy sought herein particularly qualifies this action as one in the nature of a suit at common law.

The second of the three criteria identified by this court in *Ross v. Bernard* — the remedy sought — was applied

²⁷ 326 F. Supp. 1152.

²⁸ Id.

²⁹ Id.

in *Ross* and the conclusion was that the particular claim was a legal one, without doubt, because the relief sought was money damages.³⁰ Authority for this conclusion is readily available in the decision in *Dairy Queen* where this Court explicitly agreed with the contention that insofar as the complaint requested a money judgment it presented a claim which was "unquestionably legal."³¹

Section 812 of the Civil Rights Act of 1968 authorizes judgments in favor of a successful plaintiff for "actual damages and not more than \$1,000 punitive damages."³² The specificity of the language used by Congress definitely excludes any characterization of the "damage" award as restitutive or otherwise partaking of some equitable nature.³³ The term "actual damages" is synonymous in the law with compensatory damages and its use by Congress authorizes the recovery of the unliquidated monetary equivalent of the harm and expense sustained by the plaintiff.³⁴

In our own case the plaintiff initiated her action with a request for punitive damages and subsequently enlarged

³⁰ 396 U.S. 542.

³¹ 369 U.S. 476.

³² Section 812(c), Civil Rights Act of 1968, 42 U.S.C., Sec. 3612(c).

³³ In this connection it is of more than passing interest to note that since the enactment of the 1968 Act, Congress has acted to amend the private enforcement provision of the Civil Rights Act of 1964 as it relates to the relief available. (Pub. L. 92-261, § 4, Mar. 24, 1972, 86 Stats. 104). The district court is authorized to order an award of back pay, as had been the case under the initial version of the law, and the Act was amended to authorize "any other equitable relief as the court deems appropriate." 42 U.S.C. 2000e-5, as amended. By the addition of this language Congress has acted to confirm that back pay awards in Title VII actions are "equitable" in nature. It was on this basis that the Seventh Circuit in *Rogers* distinguished the numerous lower court decisions which held that jury trial was not available in actions for back pay in Title VII actions. (467 F. 2d 1110, 1121-22).

³⁴ *Weider v. Hoffman*, 238 F. Supp. 437, 445 (M.D.Penn. 1965).

her request for relief to include her "actual damages."³⁵ At the time this claim was made the judge characterized the issues to be tried as being ". . . the issue of discrimination and the issue of actual damages suffered by the plaintiff."³⁶ The Standing Final Pre-Trial Order filed May 7, 1970 required the plaintiff to submit an itemized statement of her special damages and the Notice of Trial scheduled a "Court Trial on Damage Issue" for October 26, 1970.³⁷ When the trial opened on that day the plaintiff had relinquished all claims for relief other than punitive and actual damages.³⁸ In applying the criterion of the remedy sought to this case, the Seventh Circuit recognized that the request for damages unquestionably pointed to the matter being tried to a jury.³⁹

The claim for punitive damages provides additional justification for trial by jury. Historically only a court at law could award punitive damages because of the principle of equity that it should attempt to do justice between the parties without imposing a penalty.⁴⁰ There may be no decision in the law that depends more upon the common sense judgment of a jury than the decision of whether punitive damages should be levied and to what extent. Immediately after announcing his decision to levy \$250

³⁵ 18(a).

³⁶ Id.

³⁷ 36(a).

³⁸ 37(a)-41(a); Trial of October 26-27, 1970, p. 206.

³⁹ 467 F. 2d 1116.

⁴⁰ *Livingston v. Woodsworth*, 56 U.S. (15 How.) 624, 630-631 (1853); *Decorative Stone Company v. Building Trades Council*, 23 F. 2d 426 (2nd Cir. 1928); *Fleitmann v. Welsbach Street Lighting Company*, 240 U.S. 27 (1916); *Stevens v. Gladding*, 58 U.S. (17 How.) 604, 608-609 (1854).

in punitive damages against the Loethers, Judge Reynolds commented, "It probably takes the wisdom of Solomon to decide these cases fairly." In practice, however, the award of punitive damages is normally entrusted to the collective wisdom of a jury on the basis of its proven expertise.

It is clear that if the plaintiff had appeared before a pre-merger court of equity and sought as her relief only punitive damages and actual damages the equity court would have refused to hear the matter since the jurisdiction of equity was primarily dependent on the absence of an adequate remedy at law.⁴¹ Where damages were adequate to remedy the injury, the equity courts would refuse jurisdiction and the plaintiff would be referred to the courts at law where the facts would be found by a jury.⁴²

Certainly there is no authority for the plaintiff's theory that the trial court has the discretion to withhold an award of damages if the proof of the damages is adequate and the statutory right to recover them is established. It is evident from the history of this case that the plaintiff proceeded in quest of a monetary recovery in the face of the trial court's observation that the purpose of the statute had been fulfilled and that the defendants had absolved themselves of any need for punishment by their offer to rent the apartment to any Negro family.⁴³ An

⁴¹ *Scott v. Neely*, 140 U.S. 106, 110 (1891). Indeed, as this court observed in *Ross v. Bernard*, 369 U.S. 531, 539, between 1789 and 1938 courts of equity were expressly forbidden from hearing any suit in which there was adequate remedy at law. Act of September 24, 1789, c 20 §16.1 Stat. 82, Judicial Code of 1911, §267.36 Stat. 1163.

⁴² *Id.*

⁴³ Proceedings of April 30, 1970, pp. 4-5.

award of actual damages was finally denied by the trial court, not as a matter of discretion by way of shaping a complete remedy, but because of a failure of proof.⁴⁴

3. The factual issues are well within the "practical abilities and limitations of juries" and the statutory proceedings can readily accommodate both a jury trial, and the need for prompt relief.

The third criterion identified in *Ross v. Bernard* for discerning the "legal" nature of the matter to be tried was the "practical abilities and limitations of juries." This test was not discussed beyond being identified in *Ross* and its full meaning is not clear in the absence of some explicit application. However, we comprehend its meaning to include at least a consideration of whether: (a) in view of the particular factual issues to be tried, a jury can be expected to deal with them competently and justly; and (b) whether the presence of a jury trial is an obstacle under the particular circumstances to efficient administration of justice.

In connection with the first inquiry — whether juries may be expected to deal competently and justly with the issues — the factual issues which are likely to be presented in private enforcement actions brought under Title VIII should be considered. They will essentially present the need to weigh the credibility of the parties and witnesses to discern their motivations as well as to decide whether disputed events actually occurred or disputed comments were really made. The question of the motivation of the defendant will be particularly critical here as to the extent to which, if at all, racial considerations

⁴⁴ Trial of October 26-27, 1970, p. 210.

played a part in the defendant's refusal to rent or sell to a person in a given case.

In our own situation the critical fact-finding to be performed was in deciding whether LeRoy Loether objected to the plaintiff because of her race or to the person who was helping the plaintiff find an apartment because of her "obnoxious behavior."⁴⁵ LeRoy Loether's answer to the allegation of racial discrimination was that Mrs. Rogers' race was unknown to him when he made up his mind and that he had acted out of resentment of Miss Haessly's telling his wife that he "had to rent" to someone. He persisted in this attitude to the point of testifying at the trial on cross-examination that he wouldn't even rent the apartment to Judge Reynolds under similar circumstances.⁴⁶ The fact-finding involved deciding whether Loether was simply a "stubborn German" as his wife characterized him or was merely putting on such a pose to conceal a racial motivation.⁴⁷ The testimony presents a question of fact that obviously would have been left for the jury to decide in any other context since, as the court of appeals noted, the evidence was "marginal."⁴⁸

These factual issues are no different and are no more difficult to decide than those presented in defamation actions or actions for damages to a person or property in which both compensatory and punitive damages may be sought. The Seventh Amendment entitles the parties to a jury trial in those actions.⁴⁹ The only other factual issues

⁴⁵ 467 F. 2d 1110, 1112.

⁴⁶ Trial of October 26-27, 1970, p. 105.

⁴⁷ Proceedings of November 20, 1969, p. 71.

⁴⁸ 467 F. 2d 1110, 1111.

⁴⁹ 396 U.S. 531, 533.

in actions under section 812 relate to the measure of damages and it is virtually conceded that this fact-finding function is in the special province of the juries. Thus it may be safely concluded that the issues herein are not of such a complicated nature that they can be satisfactorily unraveled only by a judge sitting as a court of equity. Indeed the factual disputes are of a nature whereby the use of juries is particularly to be commended.

The remainder of this Brief will be devoted to showing that the private enforcement proceeding under section 812, especially as exemplified in this case, is not one in which a jury trial frustrates a need for prompt relief and that a jury would not be a disruptive intrusion into the statutory scheme. Mrs. Rogers began her action with a request for immediate relief in the form of a temporary restraining order, followed by a preliminary injunction. Judge Reynolds speedily granted both requests without being hindered in any way by a jury. The preliminary injunction forbade the rental of the apartment in question until a final determination of the case was had on the merits.⁵⁰ This had the intended effect of preserving the *status quo* and so it remained until the plaintiff consented to the dissolution of the injunction. All of the "prompt" relief available under section 812(c) had been requested and granted well before the issue of the jury trial was decided. If, as the plaintiff suggests at page 49 of her Brief, the purpose of the 1968 Act is largely fulfilled by speedy action to prevent a home or apartment from being sold or leased to another person, the instant case demonstrates that the purpose can readily be accomplished without any hindrance by a jury trial.

⁵⁰ 16a.

Also it is apparent that Congress recognized the need for prompt relief and early resolution of these cases even within the format of a civil action. The district judge is specifically authorized to move the case ahead on his calendar by section 814 of the Act and Judge Reynolds did expedite the matter by scheduling a pre-trial conference only two weeks after entry of the preliminary injunction.⁵¹ During the exchange of views between the attorneys and the judge on the issue of jury trial, it was never suggested by anyone that a jury would delay the case and the opinion denying the defendants' request for a jury does not even mention this possibility.⁵²

The plaintiff suggests that the damages awarded should be considered only as the "clean-up" performed by equity as a part of a statutory scheme constitutionally permissible under *Katchen v. Landy*, 382 U.S. 323 (1966). A strenuous effort is made to escape the "non-constitutional" decisions in *Beacon* and *Dairy Queen*, and to fit this private enforcement action into a procedural mold outside the reach of the Seventh Amendment. This argument is altogether inappropriate to the facts of this particular

⁵¹ 17a.

⁵² Proceedings of April 30, 1970; 23a-28a. In connection with plaintiff's present belief that the right to a jury trial will inevitably delay disposition in contrast to the speedy procedure available with trials to the judge alone, it is interesting to note that the Citizens Study Committee on Judicial Organization in Wisconsin has concluded that delay in getting matters on for trial by juries is not inevitable. A comprehensive review of the entire state judicial system in Wisconsin was accomplished over an 18-month period and its report was submitted in January, 1973. One of its conclusions was that the administrative procedures of civil juries were sufficiently susceptible to improvement to make jury trials as readily available as trials to the court and the Committee recommended steps be taken towards this end. (CITIZENS STUDY COMMITTEE ON JUDICIAL ORGANIZATION Report to Governor Patrick J. Lucey. January, 1973, Chap. V, p. 207).

case and civil actions under section 812 do not fit the pattern exemplified in *Katchen*.

It is readily apparent from the record that at the time of trial the plaintiff had an adequate remedy at law and had long since exhausted the claims for relief properly addressed to the equity powers of the district judge. There was no role to be played by equity at the time the availability of a jury became important.

When we turn to consider the application of *Katchen v. Landy*, it is particularly important to recognize which of the proceedings under the Bankruptcy Act was in question in that case. At issue was the jurisdiction of the bankruptcy referee in a *summary* proceeding to order the surrender of voidable preferences. The plaintiff had filed a claim in the bankruptcy proceeding and the trustee counterclaimed on the basis of alleged voidable preferences. If the plaintiff had not filed his claim in bankruptcy, the trustee would have had to sue in a *plenary* action, where a jury trial would have been available, to recover the preferences.

The plaintiff argued that *Beacon* and *Dairy Queen* forbade the referee from acting on the preference without a jury. However the referee's jurisdiction to act on the preferences in the summary proceeding was upheld and *Beacon* and *Dairy Queen* were distinguished on the basis that neither case, "... involved a specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury." 382 U.S. 323, 339.

The jurisdiction of bankruptcy courts in summary proceedings must be distinguished from and contrasted to

the jurisdiction of federal courts in plenary actions under the Bankruptcy Act and this distinction was made in *Katchen*.⁵³ The term "summary jurisdiction" refers to a jurisdictional grant in the Bankruptcy Act.⁵⁴ Within this jurisdiction the bankruptcy court, almost invariably a Referee in Bankruptcy, conducts "summary proceedings" which are based on the use of petitions and orders to show cause rather than formal pleadings. The summary proceeding will usually be instituted and disposed of in a quicker and less formal manner than an ordinary lawsuit.⁵⁵

The term "plenary jurisdiction" refers to actions instituted in district court and involves all the normal attributes of court trial, including formal pleadings, cross-examination of witnesses and the right to jury trial.⁵⁶ Collier has characterized the plenary suit as, ". . . the regular, ordinary *civil action*, with summons (or subpoena), formal pleadings, full trial, judgment and the other attendant formalities."⁵⁷ (emphasis supplied)

Since the plaintiff has argued that *Katchen* is dispositive of our case, the relevant inquiry is whether a private enforcement action under section 812 more nearly corresponds to the plenary or to the summary proceedings under the Bankruptcy Act. When Congress chose to de-

⁵³ 382 U.S. 329.

⁵⁴ Section 2 of the Bankruptcy Act, 11 U.S.C. § 11.

⁵⁵ 2 *Collier on Bankruptcy*, para. 23.02(2) (14th ed. 1971).

⁵⁶ *Tamasha Town and Country Club v. McAlester Construction Finance Corporation*, 252 F. Supp. 80, 85 (S.D.Cal. C.D. 1966).

⁵⁷ 2 *Collier on Bankruptcy*, para. 23.02(2) (14th ed. 1971); Professor Moore concurs that the plenary action in a court of bankruptcy proceeds in a federal court . . . "as any other civil action." 5 *Moore's § 38.03(4)*, n. 17.

note the section 812 action as a "civil action" it gave clear indication that it intended an ordinary lawsuit much more nearly akin to the plenary than to the summary proceeding. Under the Federal Rules of Civil Procedure every "civil action", including a section 812 action, is commenced by filing a complaint with the court.⁸⁸ This event, together with the sequence of events it triggers by operation of Rules 4 and 12 of the Federal Rules, distinguishes the section 812 action from the summary proceeding which this court acted to preserve in *Katchen*.⁸⁹ The entire formal progression in our case from the pleadings through the various motions, pre-trial conferences, pre-trial orders, trial and judgment marks the action as a typical "civil action" as opposed to a special, statutory proceeding which is streamlined for speed of disposition.

The inevitable conclusion is that *Katchen* is not dispositive of the instant case. In *Katchen* this court acted to protect a proceeding entirely distinguishable from the "civil action" authorized by section 812. A private enforcement proceeding for money damages under the Civil Rights Act of 1968 has much more in common as a lawsuit with the plenary proceeding under the Bankruptcy Act than with the summary proceeding in *Katchen*. The court need not be concerned in the instant case that the intervention of a jury trial will dismember a special statutory scheme since there is nothing more natural than a jury in a civil action.

It should not be forgotten that the 1968 Act provides for an alternative to proceeding with a civil action in district court and that the alternative has more in common with the "summary proceeding" than with the instant

⁸⁸ Fed. R. Civ. P. 3.

⁸⁹ 382 U.S. 323, 339.

case. Sections 810 and 811, whose provisions portend more expedient relief than an ordinary lawsuit, provide for informal proceedings before the Secretary of Housing and Urban Development. Within thirty days of a complaint the Secretary shall investigate the matter brought to his attention by an aggrieved party and notify whether steps are going to be taken to resolve the dispute. Section 811 equips the Secretary with a wide range of discovery tools, including authority to issue subpoenas, to assist in his investigation. If the Secretary's efforts at obtaining voluntary compliance with the law within thirty days are not successful, the aggrieved party may commence his civil action in United States district court.

This action was started without the benefit of the efforts of the Secretary to achieve a conciliation and at the end Judge Reynolds was moved to comment that, ". . . this whole case is a tragedy."⁶⁰ At least a part of this "tragedy" lies in the initial decision, before the civil action was commenced, to forsake the informal procedures for conciliating the dispute.

CONCLUSION

For the reasons stated, the decision of the court below should be affirmed.

Respectfully submitted,

EDWARD A. DUDEK

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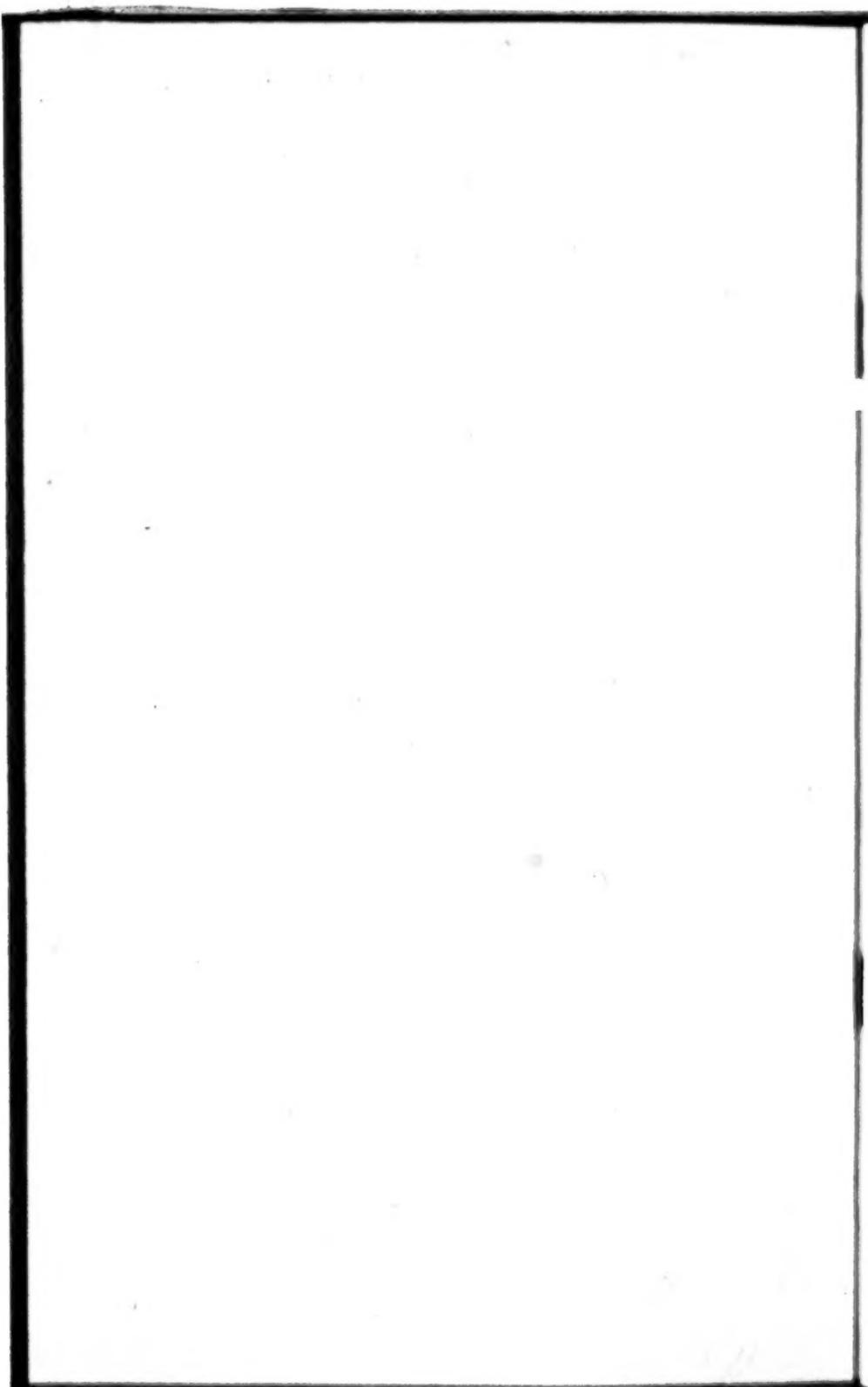
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⁶⁰ Trial of October 26-27, 1970, p. 200.



IN THE

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Supreme Court of the United States

THE RODAK, JR., CLERK

October Term, 1973

No. 72-1035

JULIA ROGERS,

Petitioner,

v.

LEROY LOETHER and MARIANE LOETHER, his wife,
and MRS. ANTHONY PEREZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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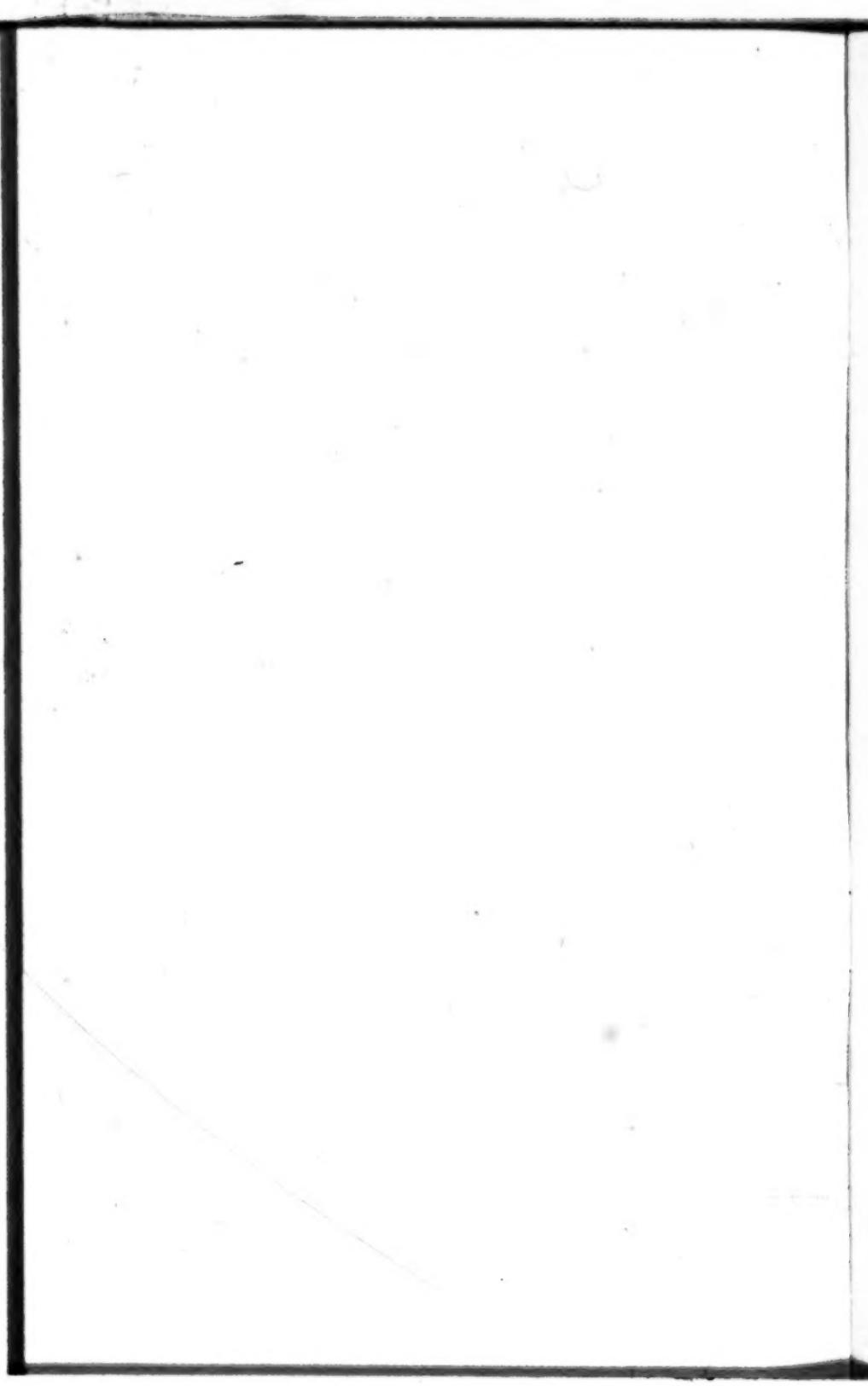
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**LEBOY LOETHER and MARIANE LOETHER, his wife,
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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
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REPLY BRIEF

It seems fair to say that Respondents, in their Point I, argue only *pro forma* the statutory construction issue in this case. In the proceeding below, Respondents urged that Title VIII did not forbid jury trials in housing discrimination litigation. Defendants' Brief in Support of Jury Trial, p. 6. The Court of Appeals itself went even further, and held that Title VIII actually required jury trials. Appendix, pp. 71a-72a. In this Court, however, Respondents have, for all practical purposes, abandoned both these positions. Respondents urge that the statutory language is ambiguous, the legislative history unhelpful, and congressional concern about hostile juries irrelevant, and conclude

Even if the Act can be fairly construed to mean that the factual issues in all private enforcement ac-

tions must be tried by a judge without a jury, the constitutionality of the statute under the Seventh Amendment must be resolved. This the plaintiff concedes.¹

Respondents describe the sole "question presented" as whether the Seventh Amendment, not Title VIII, requires a jury trial in this case.

Petitioners agree there is no real issue as to the clear meaning of Title VIII, which plainly bars jury trials in this litigation. Respondents devote the bulk of their brief² to the applicability of the Seventh Amendment, as though Congress' decision to deny jury trials had no significance other than to require that the constitutional question be reached. In fact, however, this Congressional decision is also of great importance to the manner in which the constitutional issues in this case should be resolved.

It would be one of the strangest ironies ever to arise from the chance meetings of legal doctrines if the first federal statute in modern times overturning the "common law" regarding racial discrimination in housing were to be invalidated in part on the ground that that statute merely provides for a suit at common law subject to the Seventh Amendment. The American "common law" blandly assimilated slaves to other property, awarding the writ of replevin in respect of their persons. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). After emancipation the "common law" set its whole corpus

¹ Brief For Respondents, pp. 8-11.

² Respondents allege that "there was no request for a permanent injunction in the Complaint." Respondents' Brief, pp. 2, 15. This is inaccurate. The Complaint asked "that defendants be directed to abide by their agreement to rent the above described premises to the plaintiff." Appendix, p. 6a.

"neutrally" behind the property and personal "rights" that made discrimination possible, contributing not one iota to the elimination or softening of discrimination. It is only now, when it may serve to oust Congressional choice of an efficacious remedy, that it is first discovered that the "common law" has anything whatever to do with ending racial discrimination.

While the Seventh Amendment speaks of "Suits at common law", this is not a "Suit at common law". No "Suit at common law" would have been available, anywhere at any time, in a case at all resembling this one on the merits. Brief for Petitioners, pp. 27-36. It is necessary, therefore, to ask, first, how it could have come about that the jury trial command of the Seventh Amendment ever was extended to cases not *literally* covered by the words of the Seventh Amendment, and, second, whether the method by which this extension was effected is fairly applicable to the cause of action set up by this statute and asserted in this case.

The answer to the first question is obvious. In a series of cases beginning with *Parsons v. Bedford*, 3 Pet. (28 U.S.) 433 (1830), the Seventh Amendment guarantee has been extended to "Suits" which, while not literally "at common law", are so closely analogous to such common law actions that the extension of the Seventh Amendment to those suits would preserve the constitutional values underlying the Amendment. This analogic style of reasoning marks a number of great constitutional cases. See *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827); *Boyd v. U.S.*, 616 (1886); *Wesberry v. Saunders*, 376 U.S. 1 (1964); *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Parsons* and its progeny Congress had not indicated how the actions should be tried, and this Court was forced to reason by analogy to decide whether or not jury trials should be required.

The question under *Parsons* was whether an action could have been maintained at common law or was closely analogous to such a common law action. Respondents urge this must be an action at common law because it could not have been maintained in equity. Respondents' Brief, pp. 20-21. But this argument is specious, for in 1791 the instant action could not have been maintained *either* at law *or* in equity. Litigation under Title VIII like litigation under the National Labor Relations Act, involves an entirely new substantive right and is a proceeding without significant precedent at law or in equity; such new causes of action do not fall within the reach of the Seventh Amendment, and Congress is free to require or prohibit jury trials as it sees fit. *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

Petitioner has found no case, and respondents cite none, in which this analogic extension of the Seventh Amendment has been carried to the length of invalidating an Act of Congress; it has so far served only as a guiding principle for *judicial* order-keeping. The extension by analogy of the Seventh Amendment may well be inappropriate, and certainly should be undertaken with greater restraint, when the effect of such an extension would be invalidate an important federal statute. This consideration has its maximum force when the congressional judgment in favor of non-jury trials involves enforcement of a statutorily created substantive right totally unknown to the "common" law" in 1791 or long thereafter. Indeed, it is hard to see why Congress, having full power over both national "law" and national "equity", could not constitutionally classify a radically new proceeding as "equitable" rather than "legal" on the ground (1) that adequate relief could not be had in a proceeding at law because of jury prejudice or problems of delay, (2) that legal and equitable modes of relief would

usually be inextricably entangled, or (3) that the new rights involved had no precedent in law or equity in 1791, or most closely resembled the obligations of equitable servitude imposed on the owners of real property.

All the decisions cited by respondents concern situations (1) where Congress had not spoken, and (2) where the substantive right concerned was evidently a minor variation at most on a well-known common-law right. Neither *Dairy Queen v. Wood*, 369 U.S. 469 (1962), *Beacon Theaters v. Westover*, 359 U.S. 500 (1959), nor *Ross v. Bernhard*, 396 U.S. 531 (1970) remotely resemble the instant case. Only in *Katchen v. Landy*, 382 U.S. 323 (1966) was the constitutionality of a federal statute at issue, and in *Katchen* the statute was upheld out of express deference to Congress' decision in favor of non-jury trials.

Congress' decision to prohibit juries in Title VIII litigation was intended in part to assure that a final judgment could be rendered as quickly as possible in these cases. Brief for Petitioner, 49, n.60. Such a congressional command must of course be heeded even in a case where, despite the availability of a non-jury trial, other developments have brought about a delay. In *Katchen v. Landy*, 382 U.S. 323 (1966), this Court upheld the validity of a summary non-jury bankruptcy proceeding on the ground that it was essential to speed and efficiency in certain bankruptcy hearings, even though the particular case involved was already several years old due to appeals. In this case Respondents' intransigence and the District Court's desire that the parties engage in protracted negotiations delayed the holding of a final hearing on the merits. Respondents do not seriously contend, however, that Congress acted unreasonably in prohibiting juries in the interest of efficiency, and the statutory command applies without exception to all litigation under Title VIII.

This Court should be particularly reluctant to extend the Seventh Amendment by analogy when to do so would be to overturn Congress' decision as to the form of proceeding "necessary and proper" to enforce the Thirteenth and Fourteenth Amendments. Compare *Jones v. Mayer Co.*, 932 U.S. 409 (1968). The constitutional values which might be advanced by an analogic extension of the Seventh Amendment must compete with the equally important constitutional values of equal protection of the laws and freedom from racial discrimination rooted the institution of slavery.

Petitioner is not required to prove, nor this Court required to decide, that a non-jury trial in a Title VIII action will best effectuate the Thirteenth and Fourteenth Amendments. The Constitution confides that decision to the Congress, and Congress has reasonably concluded that, in a locality where racial discrimination in housing is a problem, it will be hard to empanel twelve jurors none of whom will be hostile to the objectives of the 1968 law. The selection of a fair "cross-section" of the community will not alleviate this problem.³

Congress' decision in this regard is amply supported by experience in civil rights litigation. Since the passage of Title VIII jury trials have been requested in 10 housing discrimination cases. In all but one instance it was the defendant who requested the jury, and the plaintiff who opposed it. See Appendix, p. 1aa. Similarly jury trials

³ Compare Respondents' Brief, p. 11. Respondents urge that the Jury Selection and Service Act of 1968 and the 1972 amendments to 28 U.S.C. § 1863 assure such a cross-section. But those provisions were designed to prevent the discriminatory exclusion of black prospective jurors, not to deal with the prejudiced white jurors. Moreover it was for Congress to decide what effect the 1968 Jury Selection Act would have on proceedings under the subsequently enacted provisions of Title VIII, and Congress chose to prohibit jury trials.

have been requested in 40 Title VII racial discrimination cases since 1964; in 36 of these cases the request came from the defendant. See Appendix, pp. 1aa-4aa. In Title VII sex discrimination litigation, however, a jury has only been requested in one case, and the request was made by the plaintiff. *Gillin v. Federal Paperboard Inc.*, 53 F.R.D. 383 (D.Conn. 1970). Requests for juries in § 1981 cases alleging racial discrimination in employment have uniformly been made by the defendants. See *Harkless v. Sweeny Independent School District*, 427 F.2d 319 (5th Cir. 1970); *D'Meza v. Schulte*, Civ. Act. No. 71-2025 (D.N.J.) (order dated August 16, 1971).

Congress' decision to require non-jury trials to avoid problems of local prejudice finds significant precedent in the earliest practices of the courts of equity. In the fourteenth century it was common for petitioners to seek the aid of the King where local prejudice or the power of the defendant prevented a fair hearing and an adequate remedy at law. These cases were at first referred by the King to the Chancellor, and eventually presented directly to the Chancellor. See 1 Chaffee and Simpson, *Cases on Equity* 4-6 (1934); 1 Maitland, *Constitutional History of English Law*, 222 (1909); 1 Holdsworth, *History of English Law*, 405-406 (3rd ed. 1922). See also Bailden, *Selected Cases in Chancery*, v. XXI-XXIV (1896) (Case No. 24 (1397), petitioner can find no one "who dares act" as his lawyer; Case No. 35 (1397), unbiased jury cannot be found; Case No. 41 (1399) defendant has so many co-conspirators that fair jury cannot be found.) Equity's practice of hearing such cases fell into disuse after the fourteenth century as the turbulence of the Middle Ages waned and the rule of law became more firmly established. It was certainly within the power of Congress to revive this equitable practice to deal with a similar problem of local hostility to

open housing which Congress believed would prevent any adequate remedy at law. See Note, *The Seventh Amendment and Congressional Provision for Civil Non-Jury Trial*, 83 Yale L.J. No. 2 (Dec. 1973).

In sum the substantive right established by Title VIII was root and branch unknown to the common law, and this case is clearly not within the literal scope of the Seventh Amendment. In the past this Court has never extended by analogy the jury trial requirement where Congress has decided against such an extension, and where the effect of that extension would be to invalidate a federal law. Moreover, in this case any constitutional values which might be served by extending the jury trial requirement collide head-on with the pre-eminent constitutional value of racial justice established by the Thirteenth and Fourteenth Amendments and vindicated by Title VIII. In such a collision of constitutional values Congress' desires are of particular importance, for the first concern of the framers of the Reconstruction Amendments was to give Congress power to deal effectively with problems of racial discrimination. See Bickel, "The Original Understanding and the Segregation Decision", 69 Harv. L.Rev. 1 (1955). No case heretofore decided by this Court, and no decision extending the Seventh Amendment, has ever presented features anything like these. As between extending the right of jury trial and effectively vindicating the Thirteenth and Fourteenth Amendments, Congress' decision — that non-jury trials are "necessary and proper" to end racial discrimination — should be upheld.

CONCLUSION

For the foregoing reasons, section 812(c) is constitutional and the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

JACK GREENBERG
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SYLVIA DREW
ERIC SCHNAPPER

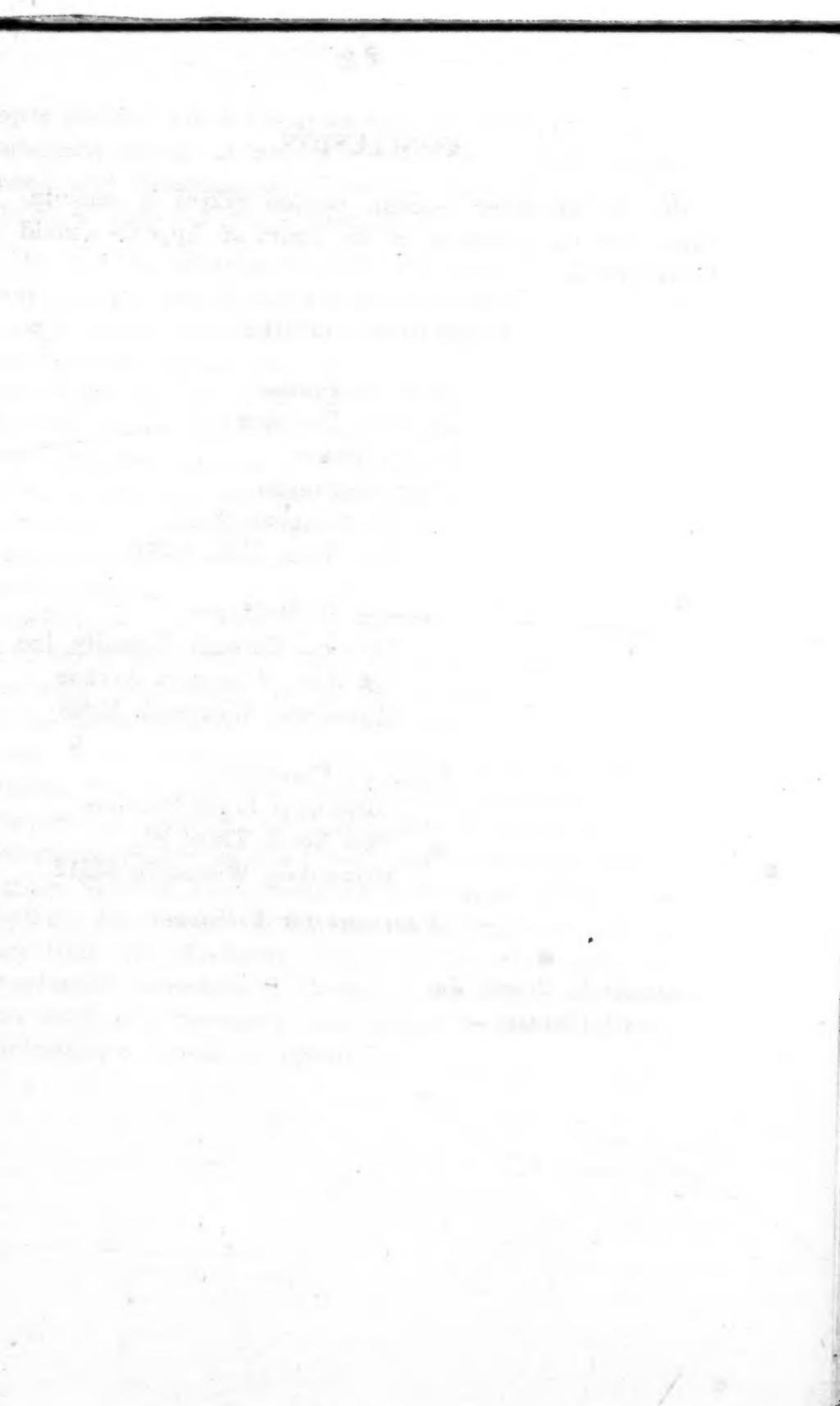
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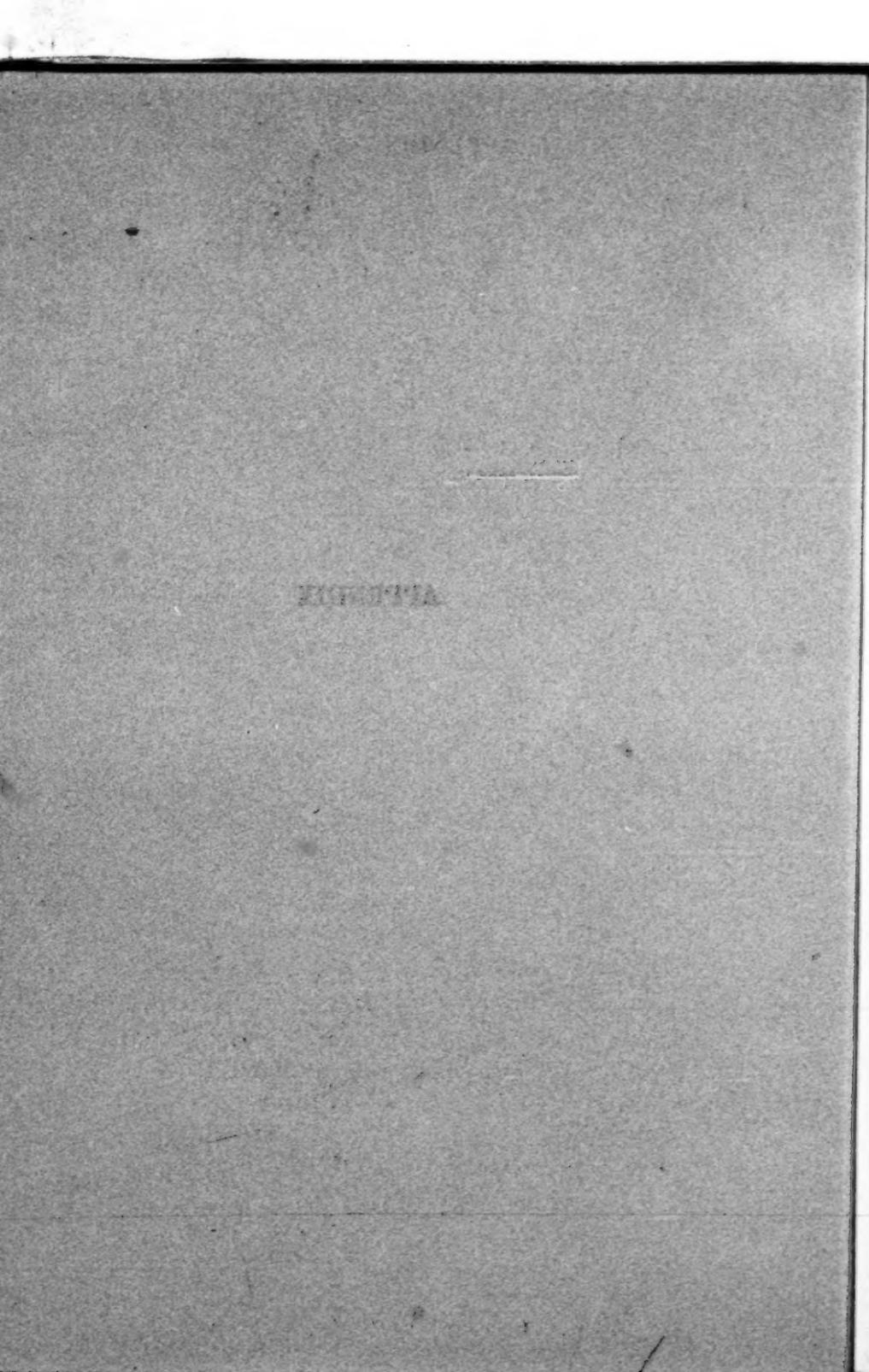
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APPENDIX

The 9 cases arising under Title VIII in which jury trials were sought by defendants are as follows:

Cauley v. Smith, 347 F.Supp. 114 (E.D. Va. 1972)

Crawford v. Doster, No. C-C-73-178 (W.D.N.C.)

Kastner v. Brackett, 326 F.Supp. 1151 (D. Nev.)

Kegler v. Polk, No. 73-842 (D.S.C.)

Kelly v. Armbrust, 351 F.Supp. 869 (D.N.D. 1972)

Lewis v. Heil-Heil, No. 72-C-1047 (N.D. Ill.)

Nelson v. Stan Glasgow Realty Co., No. 6670 (M.D. Tenn.)

Rogers v. Loether, 312 F.Supp. 1008 (E.D. Wis. 1970),
rev'd 467 F.2d 1110 (7th Cir. 1972), cert. granted
June 11, 1973

Wright v. Koules, No. 72-C-36 (N.D. Ill.)

The only cases in which a jury was granted were *Rogers* and *Kastner*.

The one case arising under Title VIII in which a jury trial was sought by plaintiff is

Noel v. Drake Management, No. 72-C-485 (N.D. Ill.)

The 36 cases arising under Title VII alleging racial discrimination in employment in which jury trials were sought by defendants are as follows:

Allen v. Braswell Motor Freight, C.A. 3-2112-14

Anthony v. Brooks, 67 L.RRM 2897 (N.D. Ga. 1967)

Baldwin v. Houston Lighting and Power, C.A. No. 71-H-175 (S.D. Tex.) (Order dated March 15, 1972)

Barnes v. Hormel Co., C.A. No. 71-H-576 (S.D. Tex.)

Barnett v. W. T. Grant, C.A. No. C-72-64 (W.D.N.C.)
(Order dated September 11, 1972)

Boutte v. Texas—U.S. Chemical Co., C.A. No. 67-25
(E.D. Tex.) (Order dated September 25, 1970)

Brown v. Gaston County Dyeing Co., 3 EPD ¶ 8044
(W.D.N.C. 1970)

Brown v. Southern Dyestuff, 3 EPD 8045 (W.D.N.C.
1970)

Cathey v. Johnson Motor Lines, C.A. 72-262 (W.D.N.C.)

Cheatwood v. South Central Bell, 303 F.Supp. 754
(M.D. Ala. 1969)

Cobb v. Alabama State Employment Service, Civ. No.
70-7-S (N.D. Ala.)

Cox v. Babcock & Wilcox Co., 471 F.2d 13 (4th Cir.
1973)

Culpepper v. Reynolds Metals, 296 F.Supp. 1232 (N.D.
Ga. 1968), rev'd on other grounds 421 F.2d 888 (5th
Cir. 1970)

Doherty v. Wilson, 356 F.Supp. 35 (M.D. Ga. 1973)

Duhon v. Goodyear Rubber Co., C.A. No. 67-79 (E.D.
Tex.) (Order dated October 16, 1970)

Eaton v. Courtaulds, N.A., C.A. No. 6648-71-P (S.D.
Ala.)

Franklin v. General Electric Co., C.A. No. 72-C-101(L)
(W.D. Va.)

Hayes v. Seaboard Coast Lines, 46 F.R.D. 49 (S.D. Ga.
1969)

Hicks v. Cannon Mills, C.A. No. C-115-5-70 (M.D.N.C.)

Johnson v. Georgia Highway Express, 417 F.2d 1122
(5th Cir. 1969)

Johnson v. Ryder Truck Lines, C.A. No. 73-3
(W.D.N.C.)

Lea v. Cone Mills, C.A. No. C-176-D-66 (N.D.N.C.)
(Order dated March 25, 1968)

Lewis v. J. P. Stevens, 4 EPD ¶ 7919 (D.S.C. 1972)

Logan v. General Fireproofing Co., 5 EPD ¶ 8012
(W.D.N.C. 1972)

Long v. Georgia Kraft Co., 328 F.Supp. 681 (N.D. Ga. 1970)

Maddock v. Sardis Luggage Co., 302 F.Supp. 866 (N.D. Miss. 1969)

Moss v. Lane Co., 50 F.R.D. 122 (W.D. Va. 1970)

Negrete v. Aviation Instrument Manufacturing Co., C.A. No. 70-H-62 (S.D. Tex.) (Order dated October 20, 1970)

Ochoa v. American Oil Co., 338 F.Supp. 163 (S.D. Texas 1971)

Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971)

Stewart v. Marquette Tool and Dye Co., C.A. No. 72-C-715 (E.D. Mo.)

United States v. Ambac Industries, 15 F.R. Serv. 2d 607 (D. Mass. 1971)

United States v. Lee Way Motor Freight, C.A. No. 72-445 (W.D. Okl. 1973)

Williams v. Shell Oil Co., C.A. No. 71-H-836 (S.D. Tex.) (Order dated July 8, 1971)

Williams v. Travenol Laboratories, 344 F.Supp. 202 (N.D. Miss. 1972)

Witherspoon v. Mercury Freight Lines, 1 FEP 662 (S.D. Ala. 1968)

The request for a jury trial was granted in *Allen*, is still pending in *Cathey, Franklin*, and *Johnson v. Ryder Truck Lines*, and was denied in the other 32 cases.

The 4 Title VII race discrimination cases in which a jury was requested by the plaintiff are

King v. Laboreis International, 443 F.2d 273 (6th Cir. 1971)

Lowery v. Whitaker Cable Corp., 348 F.Supp. 791 (W.D. Mo. 1972)

Lynch v. Pan American Airways, 5 EPD ¶ 8517 (5th Cir. 1973)

Venters v. Southwestern Bell, C.A. No. 3-2600-B (N.D. Texas) (Order dated May 8, 1969)

The request was granted in *King* and *Venters* and denied in *Lowery* and *Lynch*.





Opinion of the Court

CURTIS v. LOETHER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

No. 72-1035. Argued December 4-5, 1973—

Decided February 20, 1974

The Seventh Amendment of the Constitution entitles either party to demand a jury trial in an action for damages in the federal courts under § 812 of the Civil Rights Act of 1968, which authorizes private plaintiffs to bring civil actions to redress violations of the Act's fair housing provisions. Pp. 191-198.

467 F. 2d 1110, affirmed.

MARSHALL, J., delivered the opinion for a unanimous Court.

Jack Greenberg argued the cause for petitioner. With him on the briefs were *Michael Davidson, Sylvia Drew, Eric Schnapper, Patricia D. McMahon, Seymour Pikofsky, and Charles L. Black, Jr.*

Robert D. Scott argued the cause for respondents. With him on the brief was *Edward A. Dudek*.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Section 812 of the Civil Rights Act of 1968, 82 Stat. 88, 42 U. S. C. § 3612, authorizes private plaintiffs to bring civil actions to redress violations of Title VIII, the fair housing provisions of the Act, and provides that "[t]he court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff

*Briefs of *amici curiae* urging reversal were filed by *Solicitor General Griswold, Assistant Attorney General Pottinger, and Frank E. Schwelb* for the United States, and by *Norman C. Amaker* for the *National Committee against Discrimination in Housing*.

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actual damages and not more than \$1,000 punitive damages, together with court costs and reasonable attorney fees" The question presented in this case is whether the Civil Rights Act or the Seventh Amendment requires a jury trial upon demand by one of the parties in an action for damages and injunctive relief under this section.

Petitioner, a Negro woman, brought this action under § 812, claiming that respondents, who are white, had refused to rent an apartment to her because of her race, in violation of § 804 (a) of the Act, 42 U. S. C. § 3604 (a). In her complaint she sought only injunctive relief and punitive damages; a claim for compensatory damages was later added.¹ After an evidentiary hearing, the District Court granted preliminary injunctive relief, enjoining the respondents from renting the apartment in question to anyone else pending the trial on the merits. This injunction was dissolved some five months later with the petitioner's consent, after she had finally obtained other housing, and the case went to trial on the issues of actual and punitive damages.

Respondents made a timely demand for jury trial in their answer. The District Court, however, held that

¹ Although the lower courts treated the action as one for compensatory and punitive damages, petitioner has emphasized in this Court that her complaint sought only punitive damages. It is apparent, however, that petitioner later sought to recover actual damages as well. The District Court's pretrial order indicates the judge's understanding, following a pretrial conference with counsel, that the question of actual damages would be one of the issues to be tried. App. 18a. Petitioner in fact attempted to prove actual damages, App. 45a, but her testimony was excluded for failure to comply with a pretrial discovery order. The District Judge later dismissed the claim of actual damages for failure of proof. In these circumstances, it is irrelevant that the pleadings were never formally amended. Fed. Rules Civ. Proc. 15 (b), 16.

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jury trial was neither authorized by Title VIII nor required by the Seventh Amendment, and denied the jury request. *Rogers v. Loether*, 312 F. Supp. 1008 (ED Wis. 1970). After trial on the merits, the District Judge found that respondents had in fact discriminated against petitioner on account of her race. Although he found no actual damages, see n. 1, *supra*, he awarded \$250 in punitive damages, denying petitioner's request for attorney's fees and court costs.

The Court of Appeals reversed on the jury trial issue. *Rogers v. Loether*, 467 F. 2d 1110 (CA7 1972). After an extended analysis, the court concluded essentially that the Seventh Amendment gave respondents the right to a jury trial in this action, and therefore interpreted the statute to authorize jury trials so as to eliminate any question of its constitutionality. In view of the importance of the jury trial issue in the administration and enforcement of Title VIII and the diversity of views in the lower courts on the question,² we granted certiorari, 412 U. S. 937 (1973).³ We affirm.

The legislative history on the jury trial question is sparse, and what little is available is ambiguous. There seems to be some indication that supporters of Title VIII were concerned that the possibility of racial prejudice on juries might reduce the effectiveness of civil

² The Seventh Circuit here was the first court of appeals to consider this issue, but the reported decisions of the district courts are evenly divided on the question. In addition to the District Court in this case, the court in *Couley v. Smith*, 347 F. Supp. 114 (ED Va. 1972), held that jury trial was not required in an action under § 812. *Kastner v. Brackett*, 326 F. Supp. 1151 (Nev. 1971), and *Kelly v. Armbrust*, 351 F. Supp. 869 (N. D. 1972), held that jury trial was required.

³ Petitioner married while the case was pending before the Court, and her motion to change the caption of the case accordingly was granted. 414 U. S. 1140 (1974).

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rights damage actions.⁴ On the other hand, one bit of testimony during committee hearings indicates an awareness that jury trials would have to be afforded in damage actions under Title VIII.⁵ Both petitioner and respondents have presented plausible arguments from the wording and construction of § 812. We see no point to giving extended consideration to these arguments, however, for we think it is clear that the Seventh Amendment entitles either party to demand a jury trial in an action for damages in the federal courts under § 812.⁶

The Seventh Amendment provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be pre-

⁴ See, e. g., Hearings on Miscellaneous Proposals Regarding Civil Rights before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., 2d Sess., ser. 16, p. 1183 (1966).

⁵ See Hearings on S. 3296 before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., pt. 2, p. 1178 (1966).

⁶ We recognize, of course, the "cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided." *United States v. Thirty-seven Photographs*, 402 U. S. 363, 369 (1971), and cases there cited. In this case, however, the necessity for jury trial is so clearly settled by our prior Seventh Amendment decisions that it would be futile to spend time on the statutory issue, particularly since our result is not to invalidate the Civil Rights Act but only to direct that a certain form of procedure be employed in federal court actions under § 812.

Moreover, the Seventh Amendment issue in this case is in a very real sense the narrower ground of decision. Section 812(a) expressly authorizes actions to be brought "in appropriate State or local courts of general jurisdiction," as well as in the federal courts. The Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the Fourteenth Amendment. Since we rest our decision on Seventh Amendment rather than statutory grounds, we express no view as to whether jury trials must be afforded in § 812 actions in the state courts.

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served." Although the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time. Mr. Justice Story established the basic principle in 1830:

"The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. . . . By *common law*, [the framers of the Amendment] meant . . . not merely suits, which the *common law* recognized among its old and settled proceedings, but suits in which *legal rights* were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights."

Parsons v. Bedford, 3 Pet. 433, 446-447 (1830) (emphasis in original).

Petitioner nevertheless argues that the Amendment is inapplicable to new causes of action created by congressional enactment. As the Court of Appeals observed, however, we have considered the applicability of the constitutional right to jury trial in actions enforcing statutory rights "as a matter too obvious to be doubted." 467 F. 2d, at 1114. Although the Court has apparently never discussed the issue at any length, we have often found the Seventh Amendment applicable to causes of action based on statutes. See, e. g., *Dairy Queen, Inc. v. Wood*, 369 U. S. 469, 477 (1962) (trademark laws); *Hepner v. United States*, 213 U. S. 103, 115 (1909) (immigration laws); cf. *Fleitmann v. Welsbach Street Lighting Co.*, 240 U. S. 27 (1916) (antitrust laws), and the

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discussion of *Fleitmann* in *Ross v. Bernhard*, 393 U. S. 531, 535-536 (1970).⁷ Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.

NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937), relied on by petitioner, lends no support to her statutory-rights argument. The Court there upheld the award of backpay without jury trial in an NLRB unfair labor practice proceeding, rejecting a Seventh Amendment claim on the ground that the case involved a "statutory proceeding" and "not a suit at common law or in the nature of such a suit." *Id.*, at 48. *Jones & Laughlin* merely stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication⁸ and would substantially interfere with the NLRB's role in the statutory scheme. *Katchen*

⁷ See also *Porter v. Warner Holding Co.*, 328 U. S. 395, 401-402 (1946) (Emergency Price Control Act); *Texas & Pacific R. Co. v. Rigsby*, 241 U. S. 33 (1916) (Safety Appliance Act). The Courts of Appeals have similarly rejected the notion that the Seventh Amendment has no application to causes of action created by statute. See, e. g., *International Brotherhood of Boilermakers v. Braswell*, 388 F. 2d 193, 197 (CA5), cert. denied, 391 U. S. 935 (1968); *Simmons v. Avisco, Local 713, Textile Workers*, 350 F. 2d 1012, 1018 (CA4 1965); *Arnstein v. Porter*, 154 F. 2d 464, 468 (CA2 1946), as well as the decision of the Seventh Circuit in this case, 467 F. 2d, at 1113-1116. See generally *Developments in the Law—Employment Disrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1266 (1971).

⁸ "[T]he concept of expertise on which the administrative agency rests is not consistent with the use by it of a jury as fact finder." L. Jaffe, *Judicial Control of Administrative Action* 90 (1965).

v. *Landy*, 382 U. S. 323 (1966), also relied upon by petitioner, is to like effect. There the Court upheld, over a Seventh Amendment challenge, the Bankruptcy Act's grant of summary jurisdiction to the bankruptcy court over the trustee's action to compel a claimant to surrender a voidable preference; the Court recognized that a bankruptcy court has been traditionally viewed as a court of equity, and that jury trials would "dismember" the statutory scheme of the Bankruptcy Act. *Id.*, at 339. See also *Guthrie National Bank v. Guthrie*, 173 U. S. 528 (1899). These cases uphold congressional power to entrust enforcement of statutory rights to an administrative process or specialized court of equity free from the strictures of the Seventh Amendment. But when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law.*

We think it is clear that a damage action under § 812 is an action to enforce "legal rights" within the meaning of our Seventh Amendment decisions. See, e. g., *Ross v. Bernhard*, *supra*, at 533, 542; *Dairy Queen, Inc. v. Wood*, *supra*, at 476-477. A damage action under the statute sounds basically in tort—the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach. As the Court of Appeals noted, this cause of action is analogous to a number of tort actions recognized at common law.¹⁰

* See *Rogers v. Loether*, 467 F. 2d 1110, 1115-1116 (CA7 1972); *Developments in the Law*, *supra*, n. 7, at 1267-1268.

¹⁰ For example, the Court of Appeals recognized that Title VIII could be viewed as an extension of the common-law duty of innkeepers not to refuse temporary lodging to a traveler without justi-

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More important, the relief sought here—actual and punitive damages—is the traditional form of relief offered in the courts of law.¹¹

We need not, and do not, go so far as to say that any award of monetary relief must necessarily be "legal" relief. See, e. g., *Mitchell v. DeMario Jewelry, Inc.*, 361 U. S. 288 (1960); *Porter v. Warner Holding Co.*, 328 U. S. 395 (1946).¹² A comparison of Title VIII with Title VII of the Civil Rights Act of 1964, where the courts of appeals have held that jury trial is not required in an action for reinstatement and backpay,¹³ is

fication, a duty enforceable in a damage action triable to a jury, to those who rent apartments on a long-term basis. See 467 F. 2d, at 1117. An action to redress racial discrimination may also be likened to an action for defamation or intentional infliction of mental distress. Indeed, the contours of the latter tort are still developing, and it has been suggested that "under the logic of the common law development of a law of insult and indignity, racial discrimination might be treated as a dignitary tort." C. Gregory & H. Kalven, *Cases and Materials on Torts* 961 (2d ed. 1969).

¹¹ The procedural history of this case generated some question in the courts below as to whether the action should be viewed as one for damages and injunctive relief, or as one for damages alone, for purposes of analyzing the jury trial issue. The Court of Appeals concluded that the right to jury trial was properly tested by the relief sought in the complaint and not by the claims remaining at the time of trial. 467 F. 2d, at 1118-1119. We need express no view on this question. If the action is properly viewed as one for damages only, our conclusion that this is a legal claim obviously requires a jury trial on demand. And if this legal claim is joined with an equitable claim, the right to jury trial on the legal claim, including all issues common to both claims, remains intact. The right cannot be abridged by characterizing the legal claim as "incidental" to the equitable relief sought. *Beacon Theatres, Inc. v. Westover*, 359 U. S. 500 (1959); *Dairy Queen, Inc. v. Wood*, 369 U. S. 469, 470-473 (1962).

¹² See also *Swofford v. B&W, Inc.*, 336 F. 2d 406, 414 (CA5 1964).

¹³ *Johnson v. Georgia Highway Express, Inc.*, 417 F. 2d 1122, 1125 (CA5 1969); *Robinson v. Lorillard Corp.*, 444 F. 2d 791, 802 (CA4), cert. dismissed under Rule 60, 404 U. S. 1006 (1971); cf. *McFerren*

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instructive, although we of course express no view on the jury trial issue in that context. In Title VII cases the courts of appeals have characterized backpay as an integral part of an equitable remedy, a form of restitution. But the statutory language on which this characterization is based—~~the original of the trial court's~~—

"[T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate," 42 U. S. C. § 2000e-5 (g) (1970 ed., Supp. II)—

contrasts sharply with § 812's simple authorization of an action for actual and punitive damages. In Title VII cases, also, the courts have relied on the fact that the decision whether to award backpay is committed to the discretion of the trial judge. There is no comparable discretion here: if a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount. Nor is there any sense in which the award here can be viewed as requiring the defendant to disgorge funds wrongfully withheld from the plaintiff. Whatever may be the merit of the "equitable" characterization in Title VII cases, there is surely no basis for characterizing the award of compensatory and punitive damages here as equitable relief.¹⁴

^{v.} *County Board of Education*, 455 F. 2d 199, 202-204 (CA6 1972); *Harkless v. Sweeny Independent School District*, 427 F. 2d 319, 324 (CA5 1970), cert. denied, 400 U. S. 991 (1971); *Smith v. Hampton Training School*, 360 F. 2d 577, 581 n. 8 (CA4 1966) (en banc); see generally *Developments in the Law*, *supra*, n. 7, at 1265-1266.

¹⁴ See Comment, *The Seventh Amendment and Civil Rights Statutes: History Adrift in a Maelstrom*, 68 Nw. U. L. Rev. 503, 524-527 (1973).

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We are not oblivious to the force of petitioner's policy arguments. Jury trials may delay to some extent the disposition of Title VIII damage actions. But Title VIII actions seeking only equitable relief will be unaffected, and preliminary injunctive relief remains available without a jury trial even in damage actions. *Dairy Queen, Inc. v. Wood*, 369 U. S., at 479 n. 20. Moreover, the statutory requirement of expedition of § 812 actions, 42 U. S. C. § 3614, applies equally to jury and non-jury trials. We recognize, too, the possibility that jury prejudice may deprive a victim of discrimination of the verdict to which he or she is entitled. Of course, the trial judge's power to direct a verdict, to grant judgment notwithstanding the verdict, or to grant a new trial provides substantial protection against this risk, and respondents' suggestion that jury trials will expose a broader segment of the populace to the example of the federal civil rights laws in operation has some force. More fundamentally, however, these considerations are insufficient to overcome the clear command of the Seventh Amendment.¹⁸ The decision of the Court of Appeals must be

Affirmed.

¹⁸ Although petitioner has emphasized that the policies underlying the Fair Housing Act are derived from the Thirteenth and Fourteenth Amendments, she expressly "does not maintain that these constitutional considerations could prevent a jury trial if a jury were otherwise required by the Seventh Amendment." Brief for Petitioner 7. Moreover, although the legislative history of Title VIII with respect to jury trials is ambiguous, there is surely no indication that Congress intended to override the requirements of the Seventh Amendment if it mandates that jury trials be provided in § 812 damage actions. We therefore have no occasion to consider in this case any question of the scope of congressional power to enforce § 2 of the Thirteenth Amendment or § 5 of the Fourteenth Amendment.

